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Supreme Court of the United States

OCTOBER TERM, 1930

No. 15

BURNS POE, Collector of Internal Revenue
for the District of Washington

vs.

H. G. SEABORN

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit and on Certiorari

BRIEF OF H. G. SEABORN
(herein called Appellee)

GEORGE DONWORTH,
ELMER E. TODD,
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BRIEF OF H. G. SEABORN (herein called Appellee)

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the trial court in this case is reported in *Seaborn v. Poe,* 32 Fed. (2) 916 (R. 7). There is no opinion by the United States Circuit Court of Appeals, but that court, in certifying the questions of law as hereinafter stated, included therein a "Statement of Case," printed on pages 1 and 2 of the Certificate. The Certificate refers to the opinion of that court in a parallel case. *Rucker v. Blair,* 32 Fed. (2) 222 (Cert. 2).

References to the printed Record and Certificate. The letter "R," wherever used in this brief, means the printed "Transcript of Record" filed herein May 26, 1930. "Cert." means the printed Certificate of the Circuit Court of Appeals filed herein November 26, 1929.

Italics, wherever used in this brief, are our own unless otherwise stated.

For convenience of expression we refer in this brief to Collector Poe as "Appellant" and to Seaborn as "Appellee."

II
JURISDICTION

The Circuit Court of Appeals, on November 18, 1929, certified to this court two questions of law (Cert. 1-3) as follows:

> "First. May a husband and wife domiciled in the State of Washington make separate returns of community income, each reporting one-half thereof, and pay taxes on such returns, in accordance with the practice which has prevailed in that State for the past eight years under the rulings and sanction of the Attorney General, the Secretary of the Treasury and other taxing officers of the Government? Or, putting the question in another form—
>
> "Second. Must the husband make return and pay the tax on the entire community income of the husband and wife in that State, as suggested, if not decided by the Supreme Court in *United States v. Robbins*, 269 U. S. 315?"

On May 26, 1930, pursuant to a joint motion of the parties for a writ of certiorari, this court ordered the entire record and cause to be sent up for its consideration. The certified copy of the transcript of record was filed herein May 19, 1930. The whole matter in controversy is consequently now before this Court, pursuant to Judicial Code, Sec. 239, as amended (United States Code, Title 28, Sec. 346).

III

STATEMENT OF THE CASE

This is the test case for the State of Washington with respect to the federal taxation of community incomes, brought pursuant to the arrangement recommended in the opinion of Acting Attorney General Mitchell rendered July 16, 1927 (35 Op. Attys. Gen. 265) (Cert. 1).

After Seaborn and his wife, Charlotte A. Seaborn, had made returns and paid their income taxes, on the basis of dividing between them the community income for 1927, appellant Poe, Collector of Internal Revenue for the District of Washington, for the purpose of making a test case, levied an additional income tax assessment upon plaintiff, H. G. Seaborn, the husband, assessing to him the entire community income of the husband and wife for the year 1927. Plaintiff, having paid the additional tax under protest, sues the Collector in this action to recover the excess amount so levied and so paid (R. 22).

The Seaborns were married December 11, 1902, being then and thereafter citizens and residents of the State of Washington, and having ever since said date continuously maintained the marriage relation. The income herein concerned is wholly community income under the laws of the State of Washington. It chances to be one of the circumstances of this case that neither the plaintiff nor his wife has any separate property or income, as neither had any property at the date of their marriage and neither has since acquired any property by gift, devise, descent or inheritance (R. 20).

Plaintiff and his said wife, during and prior to the year 1927, accumulated a considerable amount of property in the State of Washington, consisting of real estate situated in the State of Washington, and of stocks, bonds, moneys and other personal property, all of the property so accumulated being the community property of the

plaintiff and his said wife under the laws of the State of Washington (R. 20, sub-paragraph G).

In the year 1927, plaintiff was an officer and employee of the Skinner & Eddy Corporation, a Washington corporation, and devoted the major portion of his time to the affairs of that corporation. The salary for the services so rendered in that year was $15,000.00 (R. 21). In addition to the salary, the following income, revenue and profit accrued from the community property aforesaid during the year 1927, namely (R. 21):

Interest on bank deposits, notes and corporation bonds	$12,881.06
Dividends on stock of domestic corporations	8,834.57
Aggregate net profit from the sale of real estate, stocks and bonds	606.59
Profit on sale of boat, "Sea Gypsy" (R. 21)	500.00
Profit on Cities Service joint venture (R. 21)	625.95

The net sum of the above mentioned items (salary and other transactions) to-wit: $38,448.17, constitutes all of the income received by the plaintiff and/or his wife in the year 1927 (R. 2, 7, 21).

It is important to note that a restatement of the items of the foregoing income, showing the same in the three classes of (1) "Income from real estate," (2) "Salary or Wages," and (3) "Income from personal property," results as follows:

Profits from sale of real estate (Lake Washington shore land)	$ 7,000.92
Salary of appellee for the year 1927, as an employe of a corporation	15,000.00
Miscellaneous interest, dividends, and gains (over losses) from personal property	16,447.25
TOTAL	$38,448.17

The item of $7000.92, profit on sale of real estate, is not shown in the schedule at R. 21, par. H, but appears as the first item in the detailed Schedule C at R. 27.

There were miscellaneous gains and losses on the sale of personal property (stocks and bonds), the losses largely exceeding the gains. When the gain of $7000.92 on real estate was consolidated with the profits and losses on stocks and bonds (mostly losses), the net result on both realty and personalty was a small profit of only $606.59, listed as "Profit from sale of real estate, stocks and bonds," as shown in Line 4, par. H, R. 21 Nevertheless, the $7000.92 profit on real estate is necessarily figured in at its full amount in arriving at the total income of $38,448.17 for the year 1927.

There was paid from the community funds for the year 1927 the following sums which constitute allowable and proper deductions from gross income under the Revenue Act of 1926:

Interest paid	$ 9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00
Bad debt allowance	325.00
Total allowable deductions	$12,171.45

(R. 2, 21, 26).

All of the income in question for the year 1927, except the salary received from Skinner & Eddy Corporation, was derived during the year 1927 from the said accumulated property mentioned in sub-paragraph "G" (R. 20-21 at end of sub-paragraph G) all of which was their accumulated community property. None of the income, and none of the property from which it was derived, was the separate property of either spouse (R. 21, sub-paragraph H).

Seaborn and his wife Charlotte each filed with the defendant tax collector, within the time required by law, income tax returns for the year 1927. Their returns were made on Form 1040 furnished to taxpayers by the Bureau of Internal Revenue. Copies of the returns filed

by the husband and by the wife are part of the record, marked rsepectively Exhibits "A" and "B" (R. 21, sub-paragraph J). For the returns, see exhibits (R. 25-31).

The return made by plaintiff Seaborn, and that made by his wife, Charlotte, were made on the community property basis, being the same basis on which their returns had been made in previous years. In each of these separate returns, there was included under proper headings, one-half of the income above described, from which there was subtracted one-half of the deductions above itemized, leaving on each return a balance of $13,138.36 as the respective net income of the individual before deducting personal exemptions and earned income credit. The two spouses divided between them the aggregate exemption of $3,500.00 (R. 22, sub-paragraph J).

The tax liability of plaintiff Seaborn upon the income so reported by him was $152.38, which plaintiff paid in full at the time required by law; and the tax liability of Charlotte A. Seaborn upon the income so reported by her was the sum of $168.32, which said wife paid to the defendant collector at the time required by law (R. 21-22).

All of said income so reported by the plaintiff and his said wife Charlotte for the year 1927 was their community income under the laws of the State of Washington. This fact was not only stipulated in writing (R. 34, Par. J), but was also expressly found by the court (R. 21, 22, Par. J). If the plaintiff and his wife were entitled to divide said income, less deductions, exemptions and credits as described, plaintiff's return was correct and the tax liability of plaintiff thereof was as stated in his return (R. 22, sub-paragraph J). The additional tax assessed against plaintiff was $703.01, plus interest in the sum of $17.92, or a total of $720.93 (R. 22, sub-paragraph K).

Plaintiff paid to the appellant collector the additional assessment demanded of him, making at the time of payment proper protest in writing (R. 22, sub-paragraph L)

Plaintiff has complied with all the conditions precedent and all the formal requirements of the statutes and rules relating to his right to institute and prosecute this suit upon the grounds alleged in the pleadings (being the points urged in this brief), and all informalities (if any) have been waived (R. 23, sub-paragraph N).

The District Court also made findings showing the attempts made to have Congress incorporate in the Revenue Acts of 1921 and 1924 provisions which would have overruled the Departmental Rulings establishing the present practice of divided returns (provisions which would have made the law read in accordance with appellants' present contentions) and showing the refusal of Congress to incorporate said proposed provisions (R. 23, 24).

The Trial Court's Conclusions of Law

The Court made conclusions of law as follows (R. 24, 25):

(1) That the income referred to in the foregoing findings of fact, being community income of the plaintiff and of his wife, Charlotte A. Seaborn, was the income of both of said spouses, each spouse having, under the laws of the State of Washington, an equal vested title and interest of one-half of said income, and (2) that said plaintiff and his said wife, Charlotte A. Seaborn, is and was each an individual within the meaning of section 210 (a) of the revenue act of February 26, 1926 (Part 2, 44 S. L., page 21), and (3) that the income tax assessable and payable thereon, under the provisions of the revenue laws of the United States in force during the year 1927 imposed a tax upon plaintiff, H. G. Seaborn, as to only one-half of said community income and imposed a tax upon plaintiff's said wife, Charlotte A. Seaborn, upon the other one-half of said community income, and (4) that the assessment, imposition, and collection of an additional income tax for said year 1927 upon and from said plaintiff, and

which has been paid by plaintiff under protest as alleged in the complaint herein and as found by the court, was not authorized by law and was and is in excess of the requirements of law, and (5) plaintiff is entitled to recover the same from defendant.

IV

STATUTES INVOLVED

A.—FEDERAL STATUTES.

The following portions of the Revenue Act of 1926 are applicable:

Title I. General Definitions

Section 2 (a). When used in this Act—(1) the term "person" means individual, a trust or estate, a partnership or corporation. * * * * * * * * (9) the term "taxpayer" means any person subject to a tax imposed by this Act.

Part II. Individuals

Normal Tax

Section 210 (a). In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum, etc. * * * * *.

Surtax

Section 211 (a). In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows. * * * * *.

Net Income of Individuals Defined

Section 212 (a). In the case of an individual the term

"net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206. * * * *

Gross Income Defined

Section 213. For the purpose of this title, except as otherwise provided in Section 233—(a) the term "gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal services (* * * * *) of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * * * *.

Credits Allowed Individuals

Section 216. For the purpose of the normal tax only, there shall be allowed the following credits: * * * * (c) * * * * or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $3500.00. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $3500.00. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

Individual Returns

Section 223 (a). The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this Title. * * *

(2) Every individual having a net income for the taxable year of $3500.00, or over, if married and living with husband or wife; * * * (b) If a husband and wife living together have an aggregate net income for the tax-

able year of $3500.00 or over, or an aggregate gross income for such year of $5000.00 or over (1) each shall make such a return, or (2) the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate net income.

B.—STATUTES OF THE STATE OF WASHINGTON INVOLVED.

The statutes of the State of Washington involved are those fixing the property rights of husband and wife in that state, and the effect of the marriage relation with respect to property. These statutes, enacted many years ago, are now found in Vol. 2 of Remington's Compiled Statutes of Washington, 1922, and are embraced within twenty-two sections of those statutes. These twenty-two sections are fully set forth in Appendix A of this brief at pp. 135 to 141, namely, Sections 6890, 6891, 6892, 6893, 6894, 6895, 6896, 7598, 6897, 6898, 6900, 6901, 6902, 6903, 6904, 6906, 10572, 10575, 10577, 10578, 10579 and 1342.

V

CONTENTIONS OF THE APPELLEE

In support of the judgment below, the appellee contends:

(1) That, all of the income herein involved being community property of plaintiff and his wife under the laws of the State of Washington, said income belonged to both plaintiff and his wife, the interest of each spouse being an actual and vested one-half interest therein.

(2) That Congress, in the Revenue Act of 1926, Secs. 223 (a) and 223 (b), intended to, and did, grant to husbands and wives in Washington the right to file separate income tax returns and to report therein, one-half each,

the income received by them, which was community property under the Washington law.

(3) A construction of the Revenue Act of 1926 which would require appellee to pay taxes or surtaxes at progressive rates by adding together and assessing to appellee the entire community income (appellee's share plus the share of his wife) would be unconstitutional.

VI

SUMMARY OF ARGUMENT

The community property system of Washington vests equally in the husband and wife the ownership and enjoyment of all community property, real and personal. Neither the accumulated real or personal property nor the income thereof, nor the salary or wages of the husband, can be taken or used for payment of the husband's separate obligations or for his personal torts. Pages 21-32.

This equal and vested ownership of the wife is evidenced not only by specific statutory provisions in the pertinent statutes, but is also shown by numerous expressions appearing in many other sections of the statutes bearing on the subject. The Washington statutes relating to the making of wills and descent of property expressly declare that each spouse owns one-half of the community property, real and personal, and provide for its disposition by will or by inheritance, accordingly. Pages 33-34.

This state of title is further recognized by the fact that, on the death of one spouse, the survivor's title and interest in his or her one-half of the community property is a mere continuation of a title already existing, and there is no change of title by inheritance or descent as to such one-half. The federal authorities recognize this con-

tinuous title by declining to assess a federal estate tax on the half interest held by the surviving spouse. Pages 34-38.

The community property in Washington consists of (a) earnings of the husband, (b) earnings of the wife, (c) recovery for personal injuries suffered by either husband or wife, and (d) the accumulations of husband and wife after marriage, with the rents, issues and profits thereof. The statutes and decisions of Washington afford the wife ample remedies for any interference with her community rights, and the vested and equal interest of the wife in community property is recognized not only by the state decisions, but also by the federal decisions and rulings. Pages 38-47.

It is a fundamental holding of this court that it will follow the state decisions interpreting state laws governing property and property rights; also that the whole subject of domestic relations of husband and wife belongs to the state and not to the United States. Pages 47-50.

There is no common law of the United States. Each state decides for itself its own common law, subject to such alteration as may be provided by its own statutes. The Washington statute (sec. 6898) expressly repeals all common law rules not in harmony with the community property law. Pages 50-51.

Husbands and wives as individuals are authorized and permitted by the express terms of the Revenue Act of 1926 to make separate returns, and to include in such returns, as the income of each spouse, their respective shares of the common income. Pages 51-53.

The association of husband and wife in the marriage relation does not come within the meaning or classification of trusts, corporations, joint stock companies or associations, as described by the Revenue Act of 1926. The only provisions of that act applicable to community in-

comes are those relating to individuals, or, possibly, partnerships. Pages 53-58.

Since Congress has no power to legislate as to domestic relations (such questions being exclusively within the power of the states), the only way to give effect to the language of the Revenue Act levying taxes "upon the net income *of* every individual" is to accept the state's laws and decisions as final on the question of ownership. Pages 58-61.

Whether or not Congress, in imposing income taxes, could constitutionally depart from the state law governing ownership, it has not attempted to do so in the Revenue Act of 1926, or in any other income tax law. Pages 58-61.

A review of the legislative and departmental record, relating to the several revenue acts and the attempts made to change the language thereof, shows a constant executive interpretation in favor of separate and divided returns by husbands and wives in community property states, and the refusal of Congress to change the language of the revenue acts so as to conform to appellant's present contention. Pages 61-64; also Appendix B, 143-156.

If the language of the revenue acts be considered as doubtful, the uniform executive construction and administrative practice (continued for the past ten years and still adhered to) will be given great weight, if not controlling weight, by the courts. Pages 64-67.

Re-enactment of the revenue act in the language which had previously received a uniform executive construction amounts to an adoption by Congress of that construction. That is to say, in the present case there was an express recognition by Congress of the propriety of the existing practice of divided returns by the husband and wife as to community property. Pages 64-67.

So far as concerns the *Robbins* case, 269 U. S. 315, the fundamental differences between the community property

system prevailing in the State of Washington and that prevailing in California require the holding that the opinion in the *Robbins* case is not here applicable. Pages 67-71.

Further, the decision in the *Robbins* case was in accordance with the departmental rulings then prevailing, which (as the opinion in that case shows) refused to California taxpayers the right of making divided returns by husbands and wives, which right the Department recognized as existing in Washington and other community property states. Naturally, therefore, the long continued executive construction as to the meaning of the revenue acts, in the case of the other seven community property states, could not have been considered by the Court as leading to the application of the ruling of the *Robbins* case to those other states. Nor could the Court have considered the effect, as to husbands and wives in other states, of the refusal of Congress to embody in the later revenue acts (after 1918) the change of language which would change the rule and practice then prevailing in those other states and to incorporate in the law the statutory construction now urged by appellant. Pages 71-73.

Revenue statutes are not to be construed so as to enlarge their scope. In case of doubt with respect to the imposition of a tax, the doubt is to be resolved against the Government and in favor of the taxpayer. Pages 73-74.

Even if it could be held that Congress has the power to impose on the husband an income tax and surtax on the income accruing to the husband and wife under the community property system of Washington, such tax would not be imposed until Congress should affirmatively legislate to that effect. Page 75.

To construe the Revenue Act of 1926 in accordance with appellant's contention would render that Act unconstitutional so far as concerns the parts of the Act now

under consideration. It is the duty of the Court so to construe the Act as to preserve its constitutionality. Pages 76-90.

Under the decision in *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, and subsequent cases, an income tax levied upon the income and gains of real estate and invested personal property is a direct tax upon the property producing such income, and the imposition of such a tax must follow ownership. This rule is not changed by the adoption of the Sixteenth Amendment, which merely dispenses with apportionment among the states. The real and personal property being, under the local state law, the property of both husband and wife, it would be unconstitutional to impose such direct tax upon only one of the owners, the husband, and to tax and surtax him accordingly. Pages 79-89.

In this case, the total income for the year 1927 was $38,448.17 (R. 21). This was the total income of both husband and wife. It was made up as follows:

Profits from sale of real estate	$ 7,000.92
Salary of appellee for the year 1927, as an employe of a corporation	15,000.00
Miscellaneous interest dividends and gains from personal property	16,447.25
TOTAL	$38,448.17

Note: The $7,000.92, profit on sale of real estate, does not appear at R. 21, but appears in the detailed Schedule C, (R. 27).

All of the income, except the $15,000.00 salary, was derived during the year 1927 as the annual product of the accumulated real and personal property which was the community property of appellee and his wife (R. 20, 21). So far as concerns the $15,000.00 of salary, the Revenue Act of 1926, Sec. 212 (a) and 213 (a) groups under one general head of "Gross income" and "Net income" all kinds of interest, dividends, gains, profits, salaries

and wages. Secs. 210 and 211 levy the income tax "upon the net income *of* every individual" as defined by Secs. 212 (a) and 213 (a). There is no ground for differentiating, in the interpretation of these statutes, between rents and gains of accumulated property, and salaries and wages, all thereof being taxed by the same formula as the net income of the individual. As to the income from accumulated property, the Constitution requires ownership to be the basis of the income tax, and whatever Congress might have done as to salaries, it has classified salaries with other income in the Revenue Act of 1926, thus making ownership the basis of the tax in all cases. Pages 85-89.

If Congress could have taxed salaries by some general excise law* applicable uniformly throughout the United States, it has not done so by the Revenue Act of 1926, but has placed salaries on the same basis as interest, dividends and property gains, taxing them by ownership. Pages 86-89.

It is further shown that, to require appellee to pay a tax based in whole or in part on the income of his wife (as defined by state law) would violate the following constitutional provisions: (a) that requiring that direct taxes shall be apportioned among the several states unless based on ownership as permitted by the Sixteenth Amendment; (b) that requiring all duties, imposts and excises to be uniform throughout the United States; (c) the Sixteenth Amendment empowering Congress to levy and collect taxes on incomes, as that Amendment has been construed in *Eisner v. Macomber,* 252 U. S. 189; *Bromley v. McCaughn,* 280 U. S. 124, and other cases; and (d) the provision of the Fifth Amendment providing that no persons shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, in that the proposed tax would be arbitrary and capricious against appellee, in taxing and surtaxing him on an income of which he is not sole owner. Pages 76-89.

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* on some other basis than ownership.

It is the duty of the Court to construe acts of Congress in such a way as to avoid grave doubt of their constitutionality, and serious constitutional questions would have to be determined before the Court could accept the construction of the Revenue Act of 1926 now proposed by appellant. Pages 89-90.

In answer to the several contentions of appellant's brief, it is shown that the husband has no such control over, or right of enjoyment of, the community property that would justify calling him the owner thereof. Pages 91-92.

It is shown that there is no basis for appellant's contention that the *Robbins* case, and *Corliss v. Bowers,* 281 U. S. 376, and *Lucas v. Earl,* 281 U. S. 111, support the view that management and control, rather than ownership, are contemplated by the Revenue Act of 1926 as the basis of taxation. It is shown that appellant's interpretation of Sec. 223 of the Revenue Act, giving the husband and wife the option of filing a joint return or individual returns, would in effect nullify that section. Pages 92-98.

It is shown that appellant's theory as to what constitutes ownership, if accepted as true, would wholly defeat appellant's contention that the husband is the sole owner of the community property and income. It is shown that appellant's contention, that the husband in Washington has actual "command" of the community income, and that such "command" rather than ownership governs the construction of the Revenue Act of 1926, taxing the income *of* every individual, is erroneous in respect to both asserted grounds. Pages 98-99.

Appellant's contention, that permission to divide community income in the State of Washington between husband and wife would be unfair as to taxpayers in states not having the community property system, is erroneous and without foundation. On the contrary, it is shown that, to adopt appellant's contention that community

income in the State of Washington should be taxed and surtaxed wholly to the husband, would be grossly unfair and arbitrary as against husbands and wives in Washington. Such contention would adopt and accept the community property law of Washington to the extent of combining in one fund the community incomes and gains earned or acquired by the husband and wife, working either separately or together (including recoveries for personal injuries to either), and then would tax and surtax the entire joint fund to the husband alone. The same wrongful result would arise from taxing and surtaxing to the husband alone the annual interest, rents and gains arising from the property jointly accumulated by the spouses during marriage. Pages 102-106.

Appellant's contention would not result in separate taxation of the income of the husband and the income of the wife, but would combine them, as required by the Washington law, and then refuse to follow the Washington law as to the ownership of the joint fund. Such result would not only be illogical, but grossly discriminating, arbitrary and capricious. If the state law is to be followed in combining in a common pool what the wife earns and what the husband earns, such law must be followed *in toto,* as to the common ownership. Pages 103-106.

It is shown that the construction of the revenue acts heretofore applied in community property states results in the taxing at the same rate of the income of every individual in each and every state of the Union, taking the local state law as the criterion of what is the income of such individual. To adopt appellant's contention would be to tax a husband in the State of Washington at a much higher rate than the rate applied in the so-called "common law" states, in that it would tax and surtax him upon the aggregate of the joint income of two individuals.

It is shown that the word "entity" as used in some

of the Washington decisions, does not mean that a new juristic being has been created. That entity is like the entity of a partnership; it is a convenient method of referring to two persons viewed with respect to the marshaling of assets, and the separation of joint from several liabilities. This view of the Washington law was distinctly and positively announced by the Washington court in *Bortle v. Osborne* (February 24, 1930) unofficially reported in 285 Pacific Reporter, p. 425, where it is declared that community property is actually owned by the two spouses in equal proportions. Pages 106-108.

It is shown that the further contentions set forth in appellant's brief, regarding the extent of the management and control of the husband of community property in Washington, are not supported by the Washington authorities. Pages 109-112.

It is shown that, under the Washington decisions, the courts have never refused to the wife ample remedies to protect any injury to her share of the community property, in the case of abandonment, dissipation or waste on the part of the husband, or his failure to exercise honest judgment in the management of the community personal property, and that, as to real estate, the wife's powers of management and control are practically equal to those of the husband. Pages 112-124.

Appellant's contention regarding alleged "command" or "dominion" of husband over community property are groundless. Distinction between manager and owner. Brief, 118-124.

It is shown that the experience of the past ten years, in carrying out the present practice of divided returns by husband and wife in Washington, has led to no difficulties whatever, and that there is no practical reason why the present practice should not be continued. Pages 125-126.

It is shown that partnerships between husbands and

wives, lawful under the laws of any state, are specifically recognized by the rulings of the Treasury Department. In all so-called "common law" states, incomes of partnerships consisting of husband and wife are divided between them and each pays the Federal income tax on his and her individual share. The fact that the husband is managing partner, or controls the partnership, is not treated as material. In the case of such partnerships, regardless of the wife's inaction and the husband's management, it is ownership that the Department applies as the sole test of the right of division of income between husband and wife. Brief 129-130.

In Washington a husband and wife cannot become partners in any partnership other than the statutory quasi-partnership of the community system.

It is shown that appellant's argument regarding the intent of Congress to create a so-called "national system" is erroneous in inferring any intent to infringe state laws defining ownership. Brief 126, 127.

It is shown that there is a clear line of demarcation between the state and federal powers, with respect to (a) property rights and (b) federal taxation. It is of vital importance that the powers of each sovereignty be upheld without impairment. Pages 131-132.

VII

ARGUMENT

ARGUMENT POINT I—The nature of the community property law of Washington and its binding effect as a matter of state sovereignty.

A.—THE COMMUNITY PROPERTY SYSTEM OF WASHINGTON VESTS EQUALLY IN HUSBAND AND WIFE THE OWNERSHIP AND ENJOYMENT OF ALL COMMUNITY PROPERTY, REAL AND PERSONAL. NEITHER THE ACCUMULATED REAL OR PERSONAL PROPERTY, NOR THE INCOME THEREOF, NOR THE SALARY OR WAGES OF THE HUSBAND NOR ANY OTHER COMMUNITY PROPERTY CAN BE TAKEN OR USED FOR PAYMENT OF THE HUSBAND'S SOLE OBLIGATIONS OR FOR HIS PERSONAL TORTS.

With the exception of property owned by the spouses before marriage and that acquired afterward by gift, bequest, devise or inheritance, and the rents, issues and profits thereof, all property acquired after marriage in any manner whatsoever by either husband or wife or both is community property (Rem. Comp. Stat., Sec. 6890, 6891 and 6892). Page 135.

By Sec. 6892, the husband has the management and control of community personal property and the like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof. As we show below, notwithstanding the generality of this language, the husband's powers are very much restricted by the judicial decisions construing this section.

By Sec. 6893, the husband has the management and control of the community real property, but is forbidden

to sell, convey or encumber it unless the wife join with him in executing and acknowledging the instrument of conveyance or encumbrance.

As to real estate, conveyances and agreements for conveyances made by the husband alone are void, even as against the husband.

Holyoke v. Jackson, 3 Wash. Ter. 235;
Hill v. Young, 7 Wash. 33;
Mabie v. Whittaker, 10 Wash. 656;
Warburton v. White, 176 U. S. 484;
Adams v. Black, 6 Wash. 528;
Kaufman v. Perkins, 114 Wash. 40.

A lease is an encumbrance under Sec. 6893, and a lease or agreement for a lease, executed by the husband alone, is void even though the wife had knowledge of it.

Spreitzer v. Miller, 98 Wash. 601;
Kaufman v. Perkins, 114 Wash. 40;
Hoover v. Chambers 3 Wash. Ter. 26.

In a suit by vendee to reform for mutual mistake a written contract for the conveyance of land, made by both a husband and wife, reformation is refused unless it be shown that the wife as well as the husband personally participated in the mistake.

Itkin v. Jeffery, 126 Wash. 47.

Referring to Sec. 6892, giving the husband the management and control of community personal property, the language of this section is construed by judicial decisions to amount to no more than the giving of a power of attorney to the husband to act in behalf of his principals, the husband and wife, thus giving effect to the language of the statute which makes community property the common property of both spouses.

In *Schramm v. Steele,* 97 Wash. 309, the Washington Court said:

> "The same circumstances, all of them and no others, which make real estate community property make personalty community property. *The two kinds of*

property are impressed with the community character by the same facts and by force of the same words in the same defining statute. All property, whether real or personal, 'property and pecuniary rights' without exception, 'acquired after marriage by either husband or wife, or both' otherwise than 'by gift, bequest, devise or descent,' is community property. Rem. Code, Sec. 5917, by reference to Secs. 5915 and 5916."

Again in the same opinion the court said:

"The provision of the statute entrusting the husband with 'the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof' (Rem. Code, Sec. 5917), must be construed in the light of this dominant fact of ownership. The property referred to is 'community' property, that is, property belonging to the community. The husband is made, by the statute, the manager, not the owner. His management and control include the power of absolute disposition, *but only for the community.* Else there is no such thing as a *vested property right in the community as to any personal property,* since the husband could give away all such property in any manner he pleased, except by will, at any time during the existence of the community. To hold that the whole substance of the term 'community property' as applied to personalty consists in a mere contingent expectancy of the wife, would make the term 'community personal property' a palpable misnomer. It would take away every community element except that the wife's labors and sacrifices had helped to earn it. *It would destroy that equality which it is the obvious purpose of our community property law to conserve.*

"These considerations make it plain that the stat-

ute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community. *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111. *The words of the statute are generally no broader than those often employed in general powers of attorney* for the management and disposition of personal property; but we have yet to learn of a case in which such a power, however broad, was held to destroy the estate of the donor of the power and subject the property to the personal debts of the attorney in fact."

In *Olive Co. v. Meek,* 103 Wash. 467, it is said:

"This statute involves community property rights and not the enforcement of individual judgments against the husband for causes without the scope of the husband's agency and management of the community property."

Snyder v. Stringer, 116 Wash. 131.

In *Marston v. Rue,* 92 Wash. 129, the Court said:

"Now a wife's rights in family personalty are not of the contingent sort, like dower or survivorship, *but a present estate.* True, by our statute the husband is made manager with full power to sell and dispose of this. But it does not follow that he can give it away. He is, so to speak, only *the head of a firm. The personal property is just as much hers as his.* The very statute that gives him sale power over the whole restricts his testamentary power to a half. Under our law, she has helped to create it as much as he. Consequently, the idea is not to be tolerated that a husband can give a mistress stocks and bonds or precious stones out of the family money. No part of those savings can be made gifts of against her consent, even to his own relatives, though mere trifles

> to the latter no doubt might be sustained under the rule of *de minimis*. The law cannot countenance his right to a wilful, premeditated waste of family personal property, which is now so often the bulk of an estate."

This case further holds that, under the circumstances shown, the wife had the right to retake the property in question (an automobile) from the husband's mistress and to sell it, adding:

> *"Her property right in it is as great as his."*

In *Stewart v. Bank of Endicott,* 82 Wash. 106, the Court said:

> "As argued by the respondents, the purpose of Sec. 5917 (6892 Rem. Com. Stat.), is to give the management and control of the community personal property to the husband *for the purpose of facilitating the business of the community.* He can neither beggar his family nor use the community personal property to gratify a caprice to thwart the law, or for his own personal agrandizement."

The wife's present interest in community personalty has been further recognized by the Washington courts in approving the practice of making the wife a party defendant in a suit brought on a contractual or tortious liability created by the husband, where it is asserted that he acted as agent of the community. In such a suit the wife has the right to assert the non-community character of the debt or obligation, and if she does so, this question must be litigated at the time that all other controverted questions in the case are litigated.

McDonough v. Craig, 10 Wash. 239;

Allen v. Chambers, 18 Wash. 341.

The wife may borrow money or otherwise incur obligations for the benefit of the community and thereby bind the community as effectually as the husband may do.

Fielding v. Ketler, 86 Wash. 194.

On the other hand, the husband, equally with the wife, is prohibited by Washington statutes from discharging out of community property an obligation which is not a community obligation, and the wife suing alone may enjoin collection of the husband's separate debt out of community property.

Spinning v. Allen, 10 Wash. 570;
Snyder v. Stringer, 116 Wash. 131;
Fidelity & Deposit Co. v. Clark, 144 Wash. 520.

It is the uniform holding of the Supreme Court of Washington that the title to community property, whether real or personal, is equally in both spouses. These decisions deny that the husband holds the *legal title* with an *equity* in the wife, and hold that the *title of both is legal.* On this point, in *Mabie v. Whittaker,* 10 Wash. 656, the Court said:

> "A good many cases have been cited by the respondents holding that a purchaser of the legal title to lands without notice of any equities therein will take the entire title and we presume this will not be disputed as a general proposition, but some of them from California and Texas go further and hold in effect that the wife's interest in community lands is an equitable interest only, and that her heirs would be cut off by such a conveyance. But in both of these states the disposition of community lands rested in the husband and he could convey the same to satisfy the community debts after her death. In some instances, the record title is spoken of as the legal title, but this can be true only in a qualified sense. A deed of lands under the conditions specified in the statute, vested the ownership in the community, no matter which spouse was named as grantee in the deed, *and the title of one spouse therein was a legal title as well as that of the other.*"

The holdings of the Washington court were expressly

affirmed by this court in *Warburton v. White,* 176 U. S. 484, where the Court, speaking of the right of disposition conferred on the husband, and after citing several Washington decisions, said:

> "This right being vested in him, *not because he was the exclusive owner,* but because by law he was created the *agent of the community.* The proceeds of the property when sold by him becoming an acquet of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community."

Again, in *Buchser v. Buchser,* 231 U. S. 157, this Court held that property obtained through the homestead laws of the United States, in the State of Washington, became the community property of the husband and wife, and that the vesting of title with respect to the same was controlled by the laws of the State of Washington, and that as to such vesting of title, the Federal Courts would follow local decisions. Mr. Justice Holmes in that case said:

> "There is no doubt, of course, that until the title is completed, the laws of the United States control * * * but when the title has passed, then the land, 'like all other property in the state, is subject to state legislation.' "

The treatment accorded the interests of the respective spouses, when the community is dissolved otherwise than by death (*e. g.* by divorce) illustrates the equal proprietary interest of the wife in community property.

In *Ambrose v. Moore,* 46 Wash. 463, the Court said:

> "From the necessities of the case, their *joint or community* property must become common property. After the divorce there is no community, and in the nature of things, there can be no community property. The divorce does *not vest or divest title;* the

title does not remain in abeyance and it must vest in the *former owners* of the property as tenants in common."

In *Schneider v. Biberger,* 76 Wash. 504, it is said:

"Such property as was community property prior to the decree and not disposed of thereby, would become common property in which husband and wife would *retain* all the interest *vested in them* prior to the decree."

The community property is not liable for the husband's torts, though committed after marriage, unless under the doctrine of *respondeat superior,* they are committed in carrying on the business of the community. For instance, a husband who holds the office of sheriff, and in that capacity committed a tort, cannot subject the community property to liability therefor.

Fidelity & Deposit Co. v. Clark, 144 Wash. 520;
Brotton v. Langert, 1 Wash. 73;
Bice v. Brown, 98 Wash. 416;
Kies v. Wilkinson, 114 Wash. 89;
Coles v. McNamara, 131 Wash. 691;
Schramm v. Steele, 97 Wash. 309;
Wilson v. Stone, 90 Wash. 365;
Day v. Henry, 81 Wash. 61.

In case the husband during marriage incurs indebtedness by becoming an accommodation endorser or guarantor of indebtedness in which the community has no interest, his liability cannot be enforced against the community property.

Peterson v. Zimmerman, 142 Wash. 385.

In *Parker v. Parker,* 121 Wash. 24, the Court said:

"The law which gives the husband the management and control of the community personal property does not give him the right to make substantial gifts thereof against the consent of his wife. As was said in *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634: 'the

statute * * * intends no more than to make him a *statutory agent* of the community.'

"Not having the consent of his wife—the record, in fact, disclosing that she would not consent thereto—the rule established in *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111, is applicable and the gift must be held to have been void."

See also:

Stewart v. Bank of Endicott, 82 Wash. 106.

The community property is not liable for the separate obligations of either husband or wife, but only for obligations which can be strictly classified as "community debts." Debts contracted by the husband (or by the wife) before marriage cannot be enforced against community property. The same is true of an obligation contracted by the husband after marriage unless the same constitute a community debt by reason of having been contracted *in behalf of the community business* under the husband's limited authority of management and control. Community *personal property* falls within this rule equally with community real etsate, and cannot be used or resorted to for the purpose of paying the husband's separate debt.

Olive Co. v. Meek, 103 Wash. 467;
Peterson v. Zimmerman, 142 Wash. 385;
Spokane State Bank v. Tilton, 132 Wash. 641;
Snyder v. Stringer, 116 Wash. 131;
Huyvaerts v. Roedtz, 105 Wash. 657.

In order that community property in Washington may be taken for a debt contracted by either husband or wife, the debt must be shown to be a debt contracted in behalf of the community, and both husband and wife are individually entitled to their day in court on the determination of this question. A judgment against the husband alone does not settle the point. The wife "has at least as much right to contest the facts" as the husband has.

Littell Mfg. Co. v. Miller, 3 Wash. 480.

The nature of the relationship between husband and wife in their ownership of the community property has been variously described in the decisions of the Supreme Court of Washington. In the early case of *Holyoke v. Jackson,* 3 Wash. Ter. 235, the Court said:

> "It probably approaches more clearly to that kind of partnership called *universal* than to any other business relationship known to the civil or common law * * * Management and disposition may be vested in either one or both of the members. If in one, then *that one is not thereby made the holder of larger proprietary rights than the other,* but is clothed, in addition to his or her proprietary rights, with a *bare power* in trust for the community."

The latest decision of the Supreme Court of Washington on this subject is found in *Bortle v. Osborne,* decided February 24, 1930 (not yet officially reported, but unofficially reported in 285 Pacific Reporter, page 425). In that case, the Court expressly declares that the community is not a distinct entity or juristic person, and that all community property is owned by both spouses equally. The Court laid down the following propositions:

> "(1) We have not receded from the rule, which we now reiterate, that the liability for the husband's tort *which is committed in the management or prosecution of the community business* can be enforced against the community property."

> "(2) By the community property law of this state, Rem. Comp. Stat., Sec. 6890-6906, the legislature *did not create an entity or a juristic person* separate and apart from the spouses composing the marital community. The legislature did nothing more than classify as community property—designate the character of certain property as community and other property as separate—the *property acquired* after marriage *by the spouses.* We have, *for convenience of expression,*

employed the terms 'entity' and 'legal entity' in referring to a partnership and to a marital community. However, we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or community, or that either the partnership or the marital community has the status of a corporation.

"A marital community is in no sense a corporation; neither is it a partnership, though the community of property between the spouses is, in a restricted sense, a partnership between the husband and wife. The legislature, in defining community property, Sec. 6890-6906, Rem. Comp. Stat., *did not change the relationship of husband and wife* to the status of a corporation or declare that the property acquired during marriage was owned by a legal personality distinct from the spouses composing the community. *In the community property each of the spouses has an undivided one-half interest.*"

The Court then quotes approvingly from 31 C. J., p. 9, where it is said:

"In a restricted sense, the community of property between the husband and wife is a partnership between the husband and wife, but, while in many respects it bears a close analogy to an ordinary partnership, the analogy is not complete, and in no exact sense can it be denominated a partnership."

In the case at bar, all of the income in question (except the salary discussed below) was the product, by way of interest, dividends or profits of community property—of the prior accumulations of Seaborn and his wife, accumulated before the year 1927. Both by statutory definition and by legal effect, the product of this accumulated community property was also community property and is so found by the Court in the present record (R. 20, Par. G). Of the total income, the sum of $7000.92 was profit

on the sale of real estate previously owned (R. 27, Schedule C).

As to the $15,000.00 of salary received from the Skinner & Eddy Corporation, not only was that salary community property of both spouses, by the positive wording of the statute (Sec. 6892) and by the repeated holdings of the Washington Court, but another section of the statute (Sec. 7598) prohibits Seaborn from making any assignment of that salary previous to its actual earning without the written consent of the wife attached to the assignment.

Further, it is important to note that the personal indebtedness of the husband could not have been collected out of that salary, either before or after its payment by the employer. This is the precise holding in *Coles v. McNamara,* 131 Wash. 691, where it was held that the husband's current earnings, being community property, were not subject to garnishment for his separate debts or liabilities. This holding, of course, follows the established rule of the Washington authorities to the effect that the husband's separate indebtedness whether in contract or tort, cannot be enforced against the community property, either real or personal.

Snyder v. Stringer, 116 Wash. 131;
Peterson v. Zimmerman, 142 Wash. 385;
Spokane State Bank v. Tilton, 132 Wash. 641;
Olive Co. v. Meek, 103 Wash. 467;
Huyvaerts v. Roedtz, 105 Wash. 657.

B.—THE EQUAL AND VESTED OWNERSHIP OF THE WIFE IN COMMUNITY PROPERTY IS EVIDENCED NOT ONLY BY THE DIRECT LANGUAGE OF THE STATUTORY SECTIONS ABOVE SPECIALLY CONSIDERED (REM. COMP. STAT., SECS. 6890, 6891 AND 6892) BUT IS ALSO DEMONSTRATED BY NUMEROUS EXPRESSIONS TO THE SAME EFFECT IN OTHER SECTIONS OF THE STATUTE.

Sec. 6898 (Appendix A, p. 138) enacts that

> "The rule of common law, that statutes in derogation thereof are to be strictly construed has no application to this chapter, * * * and its provisions and all proceedings under it shall be liberally construed with a view to effect its object."

Sec. 10572 (Appendix A, p. 140) contains detail provisions whereby a husband may convey to the wife, or a wife may convey to the husband *"his or her community right, title, interest or estate* in all or any portion of their community real property."

Sec. 10575 (Appendix A, p. 140) provides for powers of attorney by the husband or wife "authorizing the sale or other disposition of *his or her community interest or estate* in the community property." The foregoing language is not restricted to community real property, but applies also to personalty. Later language in the same section refers to "the community *estate held by such husband or wife* in any real property."

Sec. 10577 (Appendix A, p. 141) protects a *bona fide* purchaser who buys from the spouse appearing in the public record to hold the legal title, provided he is in fact *bona fide* purchaser. As shown below, this section protects only an actual *bona fide* purchaser, that is, who not only is ignorant of the marriage, but who could not ascertain the existence of the marriage, by reasonable diligence. *Dane v. Daniel,* 23 Wash. 379.

Sec. 10578 enacts that

> "A husband or wife *having an interest in* real estate by virtue of the *marriage relation,* the legal title *of record* to which real estate is or shall be held by the other, may *protect such interest,*"

from sale or disposition by the husband or wife by filing in a public office a certain written notice "describing such real estate *and the claimant's interest therein.*"

In *Dane v. Daniel,* 23 Wash. 379, it is held that no filing of such notice by the wife is required in order to protect her community interest, except as against actual *bona fide* purchasers, and that no purchaser can claim to be *bona fide* unless he shows that he not only did not know of the existence of the marriage *but could not have learned of the marriage by the exercise of reasonable diligence.* In practice, few filings are made by wives under these sections, as they rely upon the notoriety of their marriage, under the rule of *Dane v. Daniel.*

C.—THE WASHINGTON STATUTES RELATING TO THE MAKING OF WILLS AND THE DESCENT OF COMMUNITY PROPERTY EXPRESSLY DECLARE THAT EACH SPOUSE OWNS ONE-HALF OF THE COMMUNITY PROPERTY, REAL AND PERSONAL, AND PROVIDE FOR ITS DISPOSITION BY WILL OR BY INHERITANCE ACCORDINGLY.

Sec. 1342 (Appendix A, p. 143) provides that, upon the death of either husband or wife, one-half of the community property goes to the survivor and the other half is subject to the testamentary disposition of the deceased husband or wife.

> "In case no testamentary disposition shall have been made by the deceased husband or wife *of his or her half of the community property,* it shall descend

equally to the legitimate issue of his, her or their bodies."

This statute has regulated the descent and testamentary disposition of community property in Washington for more than fifty years. The language of this section is also recognized by the courts as showing the actual ownership by the husband and by the wife of their one-half interest in all the community property, real and personal.

Ahern v. Ahern, 31 Wash. 334;
Snyder v. Stringer, 116 Wash. 131;
Scott v. Stanley, 149 Wash. 29;
Hill v. Young, 7 Wash. 33;
Mabie v. Whittaker, 10 Wash. 656;
Stewart v. Bank of Endicott, 82 Wash. 106;
Parker v. Parker, 121 Wash. 24;
Buchser v. Buchser, 231 U. S. 157.

In *Scott v. Stanley,* 149 Wash. 29, it is held that, on the death of the wife intestate, her one-half of the community property vests immediately in her heirs without probate.

Consequently, the husband can do nothing to prevent the wife's willing away her one-half of the community property to strangers or, in the absence of a will, to prevent the descent, on her death, of her half of the community property to her children by the same or by a former marriage.

Suppose that, during the marriage, the husband as agent of the community builds up a substantial business, of great value as a going concern because of its earning power. Upon the wife's death, her legatees or devisees, though strangers, or, in the absence of a will, her children, can immediately insist on a liquidation or sale of the business and all other community assets in order to reduce to cash the wife's one-half of the community busi-

ness and community property which passes to her legatees, devisees or children.

Suppose, on the other hand, under the circumstances last described, the husband dies and the wife survives. The business and assets must be liquidated just the same as in the other case. The wife will continue to own one-half of all the property, and the husband's children or his legatees or devisees will take the one-half interest which belonged to the husband. There is equality of interest and equality of treatment in both cases. These statutory provisions are utterly inconsistent with the claim that the wife's interest in community property is not actual, real and vested.

D.—UPON THE DEATH OF EITHER HUSBAND OR WIFE, THE STATE LAW RECOGNIZES THAT THE TITLE OF THE SURVIVOR TO THE ONE-HALF INTEREST IN THE COMMUNITY PROPERTY IS A MERE CONTINUATION OF A TITLE ALREADY EXISTING, AND THAT THERE IS NO INHERITANCE OR DESCENT AS TO THE HALF HELD BY THE SURVIVOR. THE FEDERAL AUTHORITIES RECOGNIZE THIS CONTINUOUS TITLE BY DECLINING TO ASSESS A FEDERAL ESTATE TAX ON THE HALF INTEREST HELD BY THE SURVIVING SPOUSE.

The inheritance tax laws of the State of Washington have been uniformly interpreted as placing no tax upon the one-half of the community property held by the survivor when husband or wife dies. This proposition is so clear that the point has never been brought before the Washington courts. However, the Inheritance Tax Department of the State of Washington has constantly ruled to that effect. See *Kohny v. Dunbar,* 21 Idaho 258, where reference is made to this established practice under the Washington law.

The same ruling is made by the Federal authorities

with reference to the application of the United States estate tax. The United States have never attempted to levy an estate tax upon the interest of the surviving husband or wife in community property. It has always been conceded by the Federal authorities, and still is conceded, that no Federal estate tax applies in such cases. Obviously, this is for the reason that there is no change of title as to the one-half of the community property held by the surviving husband or wife, but the survivor holds by continuation of an existing title. The rulings of the Treasury Department and Internal Revenue Bureau on this point have been consistent and uniform.

The latest Federal ruling that we have noticed on this point is *General Counsel's Memorandum* No. 7773 (August, 1930). Notwithstanding special circumstances of the case, the General Counsel adheres to the general rule, as above stated, that the interest of the husband or wife in the community property is not subject to the Federal estate tax, saying:

> "In view of the court's decisions in the *Vincent* and *Underwood* cases, which are applicable to the instant case, it is the opinion of this office that the value of B's interest in the community property is not a part of A's gross estate within the purview of Section 302 (a) of the Revenue Act of 1926, notwithstanding the fact that she elected to take under the will."

The *Vincent* and *Underwood* cases cited by the General Counsel are decisions of the United States District Court for the Northern District of Texas. The general principle above stated was enunciated by Departmental rulings long ago. The only question raised in the recent cases was whether a different rule applied where, by reason of testamentary provisions, an election by the wife was required. As to those decisions, the General Counsel says:

> "In each of those cases, the Court held without written opinion that the interest of the wife in the

community estate was not a part of her deceased husband's gross estate. The Government did not appeal from those decisions."

E.—THE COMMUNITY PROPERTY IN WASHINGTON CONSISTS OF (A) THE EARNINGS OF THE HUSBAND, (B) THE EARNINGS OF THE WIFE, (C) RECOVERIES FOR PERSONAL INJURIES SUFFERED BY EITHER HUSBAND OR WIFE, AND (D) THE ACCUMULATIONS OF HUSBAND AND WIFE AFTER MARRIAGE, WITH THE RENTS, ISSUES AND PROFITS THEREOF.

It would be manifestly unfair to follow the state law only to the point of combining these sources of income into a joint income and then taxing the entire fund to the husband alone. No provision of the Revenue Act authorizes such a hybrid and unjust result.

The earnings of the wife are community property equally with the earnings of the husband. It is only when the wife is living separate and apart from the husband that her earnings become her separate property.

Abbott v. Wetherby, 6 Wash. 507, 512;
Marsh v. Fisher, 69 Wash. 570.

Throughout the Washington decisions, there occur cases where the community property is found to be the result of the earnings of the work or labor of the wife. Both the statute and the decisions treat the work and services of the wife as having the same effect as the work and services of the husband, namely, to produce community property.

In *Jones v. Duke,* 151 Wash. 108, it was held that a wife's bank account, accumulated by her savings from allowances for running a house and from money received from a roomer and boarder, is community property.

In *Wamsley v. Rostad,* 150 Wash. 192, 196, it was held that, where an unmarried woman had a contract for com-

pensation for caring for an invalid mother, the woman's marriage converted the subsequent earnings under that arrangement into community property. The Court said:

> "From the date of the marriage, the earnings of the deceased (she at all times up to her death having lived with her husband) belonged to the community, and earnings subsequent to the marriage could not be diverted from the community by the prior contract."

It is, of course, the common practice for married women to earn money as clerks, assistants in various occupations, musicians, teachers and what-not. They are frequently engaged in mercantile and professional occupations, either singly or in combination with their husbands. All earnings and profits so made by a married woman become community property in Washington. It is absurd to say that the community property law of the State is to be followed up to the point of converting these earnings of the wife into community property, and then refusing to give to the state community property statutes their further effect by recognizing the joint and common interests of both spouses in the product.

The same principle applies as to recoveries for personal injuries suffered by either husband or wife. Whatever personal injury the wife undergoes, the compensation therefor is community property.

Hynes v. Colman Dock Co., 108 Wash. 642;
Wampler v. Beinert, 125 Wash. 494.

The community property law of Washington does not require any showing as to whether the community property arises from one or all of the four sources set forth in the foregoing proposition E. The wife's interest in all of the community property arises positively from the state law which makes all thereof the common property of the husband and the wife and protects equally the interest of both spouses therein.

All of the income involved in this case, except the

$15,000 salary, was produced as rents, issues and profits of the prior accumulations of the husband and wife, their common property. How much the personal earnings of the wife and her personal efforts (or her personal injuries) contributed to those accumulations in prior years does not appear in the record and is immaterial. The material fact is the ultimate fact that all of those accumulations were the joint and common property of both spouses.

F.—THE STATUTES AND DECISIONS IN THE STATE OF WASHINGTON AFFORD THE WIFE AMPLE REMEDIES FOR ANY INTERFERENCE WITH HER COMMUNITY RIGHTS.

Given the status of community property, the foregoing proposition naturally follows:

Marston v. Rue, 92 Wash. 129;

Schramm v. Steele, 97 Wash. 309;

Kimble v. Kimble, 17 Wash. 75;

(An action brought by the wife against the husband, wherein the Court set aside a deed executed by the husband, conveying property to his mistress.)

Fields v. Fields, 2 Wash. 441;

(In which a conveyance by the husband to his brother, made without consideration, was set aside.)

Spinning v. Allen, 10 Wash. 570.

(In which the wife, suing alone, was given an injunction against the collection of a separate debt of the husband out of community property.)

In *Hynes v. Colman Dock Co.,* 108 Wash. 642, a wife brought suit against a third party for personal injuries received by her, and made the husband a party defendant. Re-

covery to the wife was refused on the sole ground that the complaint did not allege "*abandonment* or *dissipation,* or *waste* of the community personalty, nor of the *husband's failure to exercise honest judgment* in refusing to institute action." This decision applies the same principle as that announced in *Marston v. Rue,* 92 Wash. 129, and, in fact, holds by necessary implication that the wife alone may maintain an action even as to the community personal property, where she alleges that there has been an abandonment of the cause of action by the husband, or dissipation or waste thereof, or that the husband has failed to exercise honest judgment in the exercise of his statutory powers.

In *Mattinson v. Mattinson,* 128 Wash. 328, a suit by the wife alone against the husband alone was sustained and the wife's claims against the community property upheld.

In *Normile v. Denison,* 109 Wash. 205, the Court, at the suit of the wife, set aside conveyances and transactions whereby the husband had attempted to defraud his wife of community property.

In *Wampler v. Beinert,* 125 Wash. 494 (discussed more at length at p. 113 of this brief), the Court protected the wife's interest in community personal property where the husband had neglected or refused to act in asserting a claim for personal injuries to the wife and had attempted to settle and release the claim therefor. The Court held that the purpose of the statute, giving the husband management and control of the community personal property is only for the purpose of facilitating the business of the community, and that he cannot use that power to *thwart the law.* The Court also held that the doctrine of *respondeat superior* cannot be applied to acts of the husband when such acts are without the scope of his authority, and the Court speaks of the wife's "inherent power" to act when necessary to protect her interest in community

property. Further, in this case (*Wampler v. Beinert,* 125 Wash. 494), the Court adopts the Texas rule as established in *Dority v. Dority,* 96 Texas 215, and other Texas cases, that the wife can protect, and enforce in the courts by suit against the husband, her property rights in community property, and the Washington court quotes from *Dority v. Dority* as follows:

> "—his right of management is dependent upon the discharge of the duties which go hand in hand with that right, * * * if the husband has repudiated the duties, and is asserting only the rights and powers of his position for selfish purposes, the wife has rights of property which she can enforce in the courts * * *."

In the same case (*Wampler v. Beinert,* 125 Wash. 494), the Washington court also approves and follows the holdings of the Idaho Court along similar lines, quoting with approval the following from *Hall v. Johns,* 17 Idaho 224:

> "—the interest of the wife is so vested in her that the husband cannot deprive her of it by voluntary alienation for the mere purpose of divesting her of her claim to it."

No case can be found in the State of Washington where the wife has been refused protection as to community property, either real or personal, where the husband has been guilty of dissipation or waste, or fraud, or has failed to exercise honest judgment in the exercise of his statutory power of attorney, or where, for any reason, the wife's interest needs protection.

In fact, the necessary conclusion from all of the holdings of the Washington courts is that the wife, being the actual holder of the legal title to one-half of the community property, real and personal, can maintain any appropriate action to preserve her rights when in danger. The fact that there are few actions of this kind in the

Washington reports is due to the fact that the wife's rights are thoroughly well known and recognized and do not require litigation to compel respect to them.

G.—THE VESTED AND EQUAL INTEREST OF THE WIFE IN COMMUNITY PROPERTY IN WASHINGTON IS RECOGNIZED NOT ONLY BY THE STATE DECISIONS BUT ALSO BY THE FEDERAL DECISIONS AND RULINGS.

The decision of this court in *Warburton v. White,* 176 U. S. 484, cites and quotes from several of the Washington decisions which we have cited above in this brief, approves those decisions and asserts the wife's positive interest in the community property in Washington. Quoting from the case of *Mabie v. Whittaker,* 10 Wash. 656, this court recognizes that the wife's right is as much vested in community property as is the husband's (p. 493). At p. 494, this court said:

> "Now it cannot in reason be denied that the decisions from which we have just quoted held that the purpose of the legislature of Washington, whether Territorial or State, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during marriage, with community funds, became an acquet of the community and *not the sole property of the one in whose name the property was brought,* although, by the law existing at the time, the husband was given the management, control, and power of sale of such property. This right being vested in him, *not because he was the exclusive owner,* but because by law he was created the *agent* of the community."

Further, at p. 497, this court said:

> "It is a misconception of that system to suppose

> that, because power was vested in the husband to dispose of the community acquet during marriage, as if it were his own, therefore by law the community property *belonged solely to the husband.* The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the *common ownership* would attach to the result of the sale of the property."

In *Arnett v. Reade,* 220 U. S. 311, a case involving the nature of the title to community property in New Mexico, this court cites and follows *Warburton v. White.* The opinion of the court declares:

> "It is conceded by the court below and everywhere, we believe, that in one way or another she (the wife) has a remedy for an alienation made in fraud of her by her husband."

and this court expresses the view that the legislature could not put an end to the wife's interest "without compensation consistently with the Constitution of the United States."

As to the several opinions of the Attorneys General of the United States, we discuss those more at length hereafter. At this point, however, it is opportune to quote from the opinion of Attorney General Palmer (February 26, 1921, 32 Op. Attys. Gen. 435). The portion of the opinion referring to the State of Washington quotes the pertinent statutory provisions and concludes:

> "It appears to be the settled law of that state that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. Leading cases are: *Holyoke v. Jackson,* 3 Wash. Ter. 235; *Mabie v. Whittaker,* 10 Wash. 656, 39 Pac. 172; *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111; *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634; *Huyvaerts v. Roedtz,* 105 Wash. 657, 178 Pac. 801."

Similar statements are made by the Attorney General with respect to the community property laws of the other seven states except California, concerning which he says the statutes and decisions of that state require a different holding. He says:

> "Summarizing, it appears that in all of the community property states, except California, their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. *Her rights in the property of the community are perhaps most fully recognized in the state of Washington,* where both spouses have testamentary disposition over one-half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington, he may not sell, convey or encumber real estate unless the wife join with him in the conveyance; and as was held in *Huyvaerts v. Roedtz, ante,* and *Schramm v. Steele, ante,* the separate debt of the husband cannot be satisfied out of community property where it is not incurred in connection with community business, nor for the benefit of the community."

The same principle has been declared by the Court of Appeals of the District of Columbia.

Bek v. Miller, 8 Fed. (2nd) 797.

In ruling on the precise point involved in the present appeal, namely, the right of the husband and wife in the State of Washington to make separate returns and to pay the income tax accordingly, the Circuit Court of Appeals for the Ninth Circuit, in *Rucker v. Blair,* 32 Fed. (2) 222, speaking of the community property system of Washington, said:

> "The wife has during coverture, as well as upon dissolution of the marriage, a vested and definite

interest and title in community property *equal in all respects* to the interest and title of her husband therein. *Marston v. Rue,* 92 Wash. 129, 159 P. 111; *Schramm v. Steele,* 97 Wash. 309, 166 P. 634; *Huyvaerts v. Roedtz,* 105 Wash. 657, 178 P. 801. See also Op. Atty. Gen., March 3, 1921, TD 3138, 4 CB 238."

The decisions of the United States District and Circuit Court of Appeals, regarding this same question as to taxation of community incomes in Texas, Louisiana and Arizona, are to the same effect.

Bacon v. Hopkins, 27 Fed. (2) 140;
Hopkins v. Bacon, 38 Fed. (2) 651;
Bender v. Pfaff, 38 Fed. (2) 649;
Koch v. Goodell (District Court, Arizona, March, 1929; not reported).

In fact, the broad statement can be made that all courts, state and federal, which have passed upon the question with respect to the federal taxation of community incomes (the status in California only excepted) have uniformly held that the wife is the owner of one-half of the community income and, as such, is taxed in the several Federal Revenue Acts, and is entitled to return thereunder her half. We later call attention to the departmental and legislative history of this question and, when facts in that connection are considered along with the judicial decisions, the situation presented is that all departments of the Government—executive, legislative and judicial—to whom the question has been presented have all concurred in sustaining the present practice of individual returns by husband and wife as to community income.

The General Counsel of the Internal Revenue Bureau, in Memorandum No. 6351, involving the status of certain income in Texas, said:

"It is settled that the Federal courts follow the state courts where they have spoken in regard to the

property rights of their citizens (citing cases). In this manner, the Federal courts apply the state law in determining the owner of the funds regarded as income, and so ascertain the person to whom that income is to be taxed."

H.—IT IS A FUNDAMENTAL HOLDING OF THIS COURT THAT, AS A MATTER OF SETTLED POLICY, IT WILL FOLLOW THE STATE DECISIONS INTERPRETING STATE LAWS GOVERNING PROPERTY AND PROPERTY RIGHTS. ALSO THAT THE WHOLE SUBJECT OF DOMESTIC RELATIONS OF HUSBAND AND WIFE BELONGS TO THE LAWS OF THE STATES AND NOT TO THE LAWS OF THE UNITED STATES.

In *Warburton v. White,* 176 U. S. 484, 496, this rule is enunciated in the following language:

"Where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state."

To the same effect are the following cases:

DeVaughn v. Hutchinson, 165 U. S. 566;
United States v. Crosby, 7 Cranch. 115;
Middleton v. McGrew, 23 Howard 45;
Lippincott v. Mitchell, 94 U. S. 767;
Washington v. Miller, 235 U. S. 422;
Buchser v. Buchser, 231 U. S. 157;
Elmendorf v. Taylor, 10 Wheat. 152, 159;

Hines Yellow Pines Trustees v. Martin, 268 U. S. 458, 464;

Knights v. Meyer, 265 U. S. 30;

Bucher v. Cheshire R. Co., 125 U. S. 555;

Burgess v. Seligman, 107 U. S. 20, 27.

In *Ohio v. Agler,* 280 U. S. 379, this Court said:

"It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.' (Re *Burrus,* 136 U. S. 586, 593, 594.)"

In the same opinion, the court said:

"In the absence of any prohibition in the Constitution or laws of the United States, it is for the state to decide how far it will go."

Among the most fundamental of all the powers reserved to the several states as a necessary part of their sovereignty, is the power to regulate marriage with its resulting effects on the proprietary rights of the spouses. No part of that power has been conferred on the Federal Government. The same is true of titles to property, rights of enjoyment thereof, and the creation of property rights. Except only as restrained by the Fourteenth Amendment, the powers of the states in these respects are sovereign and unlimited.

Wherever any Attorney General of the United States has been called upon to rule on any such question, the principle now asserted has been upheld and emphasized. In the opinion of the Attorney General rendered February 26, 1921 (32 Op. Attys. Gen. 435), the Attorney General said:

"In *Warburton v. White,* 176 U. S. 484, 496, the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme

Court will follow the State decisions if possible to do so, in the discharge of its duties. Also in *DeVaughn v. Hutchinson,* 165 U. S. 566, 570, it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. In *United States v. Crosby,* 7 Cranch. 155, it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the same is situated."

The present Attorney General of the United States, in the opinion of July 16, 1927 (35 Op. Attys. Gen. 265), adhered to the same principle, saying:

"The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income *belongs* to him, and to prevent the wife from returning a share of the community income as her own unless that share *belongs* to her. * * * The nature and extent of a wife's interest in community income in any of these states is to be determined from the statutes and decisions *of the state.* In determining the nature of an interest in community income, created by state law, it is necessary for the Federal courts to accept the decisions of the state courts construing the statutes creating the interest and to determine from the statutes and decisions of the state courts the intrinsic nature of that interest."

To the same effect is General Counsel's Memorandum 6351, which says, "In this manner the federal courts apply the state law in determining the owner of the fund regarded as income, and so ascertain the person to whom that income is to be taxed."

It would be nothing short of revolutionary to hold that the sovereign powers of the states, in respect to the determination of these questions of domestic relations

and property rights, has passed to any extent under Federal control. The upholding of state rights with respect to these vital issues is of transcendent importance in the preservation of this Government.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several states, each for itself, applied as its local law, *and subject to such alteration as may be provided by its own statutes. Smith v. Alabama,* 124 U. S. 465. In that case, this Court said:

> "It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the state, without regard to their pursuits, is subject to change *at the will of the legislature of each state,* except as that will may be restrained by the constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the state undertakes to enforce as its public policy. And *it was in contemplation of the continued existence of this separate system of law in each state that the constitution of the United States was framed* and ordained with such legislative powers as are therein granted expressly or by reasonable implication."

The principle is well expressed by the Supreme Court of Washington in *Curry v. Wilson,* 57 Wash. 509, where the court said:

> "The right of the state to fix the character of property acquired by its citizens and the terms under which it shall be holden, is a right of sovereignty and a matter in which the Congress of the United States can have no concern."

Except as restricted by the Fourteenth Amendment,

each state is as sovereign with respect to these powers as if it had remained outside of the Federal Union.

In speaking of the power of the state to control and regulate property rights of married persons, this Court said:

> "Marriage is a civil institution, a status, in reference to which Mr. Bishop has well said, 'Public interests over-shadow private—one which public policy holds specially in the hands of the law for the public good, and over which the law presides in a manner not known in the other departments.'"
>
> *Neilson v. Kilgore,* 145 U. S. 487.

ARGUMENT POINT II. The meaning and effect of the Revenue Act of 1926.

A.—HUSBANDS AND WIVES, AS INDIVIDUALS, ARE AUTHORIZED AND PERMITTED BY THE EXPRESS TERMS OF THE REVENUE ACT OF 1926 TO MAKE SEPARATE RETURNS AND TO INCLUDE IN SUCH RETURNS, AS THE INCOME OF EACH SPOUSE, ONE-HALF OF THE COMMUNITY INCOME.

Each of the statutes levying income tax undertakes to tax the net income of each individual citizen of the United States. The Act of 1913 assessed a tax—

> "upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States."

Through all of the succeeding acts down to and including the Act of 1926 (and also thereafter) the language employed has in substantially the same terms levied a tax upon the net income of each *individual* however acquired.

The Revenue Act of 1926, under the heading of "In-

dividuals'' and under the heading of ''Individual Returns'' enacts:

''INDIVIDUALS

Normal Tax

Sec. 210. (a) In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year *upon the net income of every individual* (except as provided in subdivision [b] of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in Section 216, etc.

Surtax

Sec. 211. (a) In lieu of the tax imposed by Section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by Section 210 of this Act, there shall be levied, collected, and paid for each taxable year *upon the net income of every individual* a surtax as follows: etc.

Individual Returns

Sec. 223. (a) *The following individuals shall each* make under oath a return stating specifically the items *of his gross income* and the deductions and credits allowed under this title—(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife; (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

Sec. 223. (b) *If a husband and wife living together* have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—(1) *Each shall make such a return, or* (2) *The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.*

Sec. 216. (c) A husband and wife living together, shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. *If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.*"

The above sections of the Revenue Act, it is to be noted, give to husbands and wives a right to elect to file separate returns or a single joint return, and plainly state that the *income of each* may be included in separate returns, or consolidated in a single return. The language of the statute quoted above expressly and clearly authorizes the filing of separate returns by husband and wife to eliminate the calculation of their tax liability "on the aggregate income." This is the procedure which has been followed for years in Washington and six other states under the rulings and regulations of the Internal Revenue Department, and in accordance with the opinions of three Attorneys General of the United States. This was the procedure followed by the plaintiff and his wife in this case.

The language we have quoted pertinent to this discussion is the same as the language of the preceding Revenue Acts dealing with this subject.

B.—THE ASSOCIATION OF HUSBAND AND WIFE IN THE MARRIAGE RELATION DOES NOT COME WITHIN THE MEANING OR CLASSIFICATION OF TRUSTS, CORPORATIONS, JOINT STOCK COMPANIES AND ASSOCIATIONS AS DESCRIBED IN THE REVENUE ACT OF 1926. *THE ONLY PROVISIONS OF THE ACT APPLICABLE TO COMMUNITY INCOMES ARE THOSE RELATING TO INDIVIDUALS OR POSSIBLY PARTNERSHIPS.*

We do not understand that the affirmative of this proposition has ever been asserted by the Government.

Husbands and wives all over the United States own property and receive income, the title to which income is determined wholly under the laws of the state in which the husband and wife reside. Sec. 223 (b) above quoted establishes the uniform law of husbands and wives throughout the United States imposed by Congress with respect to the income tax, and there is nothing in that section or in any other section which would warrant the classification of the marital relation in Washington as different from that to be applied in New York or any other state.

As shown, the Revenue Act of 1926, as well as previous acts, imposes a Federal income tax on *individuals* and, under the heading "Individuals," expressly permits husbands and wives to make separate returns of their income (Sec. 223 [a] [b]). We submit that language could not be plainer in authorizing and permitting the plaintiff in this case and his wife to report separately one-half of the community income if, *by the law of the state,* the income *belongs* to them. It is to be noted that, after imposing an income tax on individuals, including husbands and wives as such individuals, by the language of the Act that we have already discussed, the Act then expressly defines and classifies as entities, for purposes of taxation, trusts, corporations, joint stock companies and associations. (Sec. 219, a, b, c, d, e, f, g, h; 225, 230, 231, 232, 233, etc.)

In the case of a trustee, where the income is distributed to the beneficiaries, the income tax is assessed against the beneficiaries and not against the trustee. Sec. 219 (b) (2). In certain cases where the income is retained by the trustee or is distributed only under certain conditions, the income is taxed to the trustee. Sec. 219 (a). In any case, the tax assessed against a trustee is paid by the trustee and based upon the income from the *trust estate,* and has *nothing to do with the separate individual return* of the person who happens to be trustee or the calculation of his *individual* income tax.

The marital relation, known as the community, cannot be held to come within the meaning and description of trusts, as defined and described in the Revenue Act. In the State of Washington, the community system involves no trust whatever, as the interest of both husband and wife in the community property is a legal interest, each spouse being the legal owner and the holder of the legal title thereto as much as the other.

Mabie v. Whittaker, 10 Wash. 656;
Schramm v. Steele, 97 Wash. 309;
Marston v. Rue, 92 Wash. 129;
Stewart v. Bank of Endicott, 82 Wash. 106.

The community is a relationship *sui generis* and has never been described or classified in either the civil or common law jurisprudence as a trust. As hereinbefore shown under Argument Point I, the Supreme Court of Washington has said that the relationship approaches more nearly to that of a universal partnership than to any other business relationship, and the Washington court approves the statement in 31 C. J. p. 9, to the effect that—

> "In a restricted sense, the community of property between the husband and wife is a partnership between the husband and wife, but, while in many respects it bears a close analogy to an ordinary partnership, the analogy is not complete, and in no exact sense can it be denominated a partnership." This brief, pp. 30, 31.

Certainly, there is nothing in the Revenue Act of 1926, or any of its predecessors, indicating a congressional intent to treat a husband and wife as a trust, corporation, joint stock company or association.

If the relationship were, by positive statute, declared to be a trust, even then without a positive statutory enactment (whose constitutionality would in such a case be more than doubtful), the individual denominated a trustee would not be required to add his individual income to the income of the trust estate under his administration for the pur-

pose of calculating the surtax. A trustee makes a separate return as an individual in which is included his personal income, and makes another separate return as trustee for the trust estate in which is included the income from the property belonging to the beneficiaries, which is under his control. If, therefore, we should assume for the purpose of argument that the husband as managing partner could be considered a trustee for his wife as to her share of the entire community partnership and community income (which inference would be in direct conflict with the Washington statutes and decisions) even then, the husband would be required under the plain language of the Revenue Act to make a separate return as trustee of that part of the community income accruing to the wife (for which he would, under that hypothesis, be trustee) and another and separate return in his own behalf as an individual.

It must be remembered that in the *Robbins* case, 269 U. S. 315, so much relied upon by the Government, it was clearly held that under the California law there construed in connection with the Revenue Act of 1918, the husband must include in his individual separate return not only the half of the community income claimed by himself, but also the other half of the community income claimed by the wife, and that the entire income must be treated as one in computing the husband's individual surtax. This is plainly on the ground that, under the California law, the husband is really the owner of the entire income. If the court had been of opinion that the husband in California received part of the income for himself and part as trustee for his wife, an entirely different result would have been reached. The real question therefore is, "To what *individual* does the income *belong?*" Or (what is the same thing) "*Of* what *individual* is it the income?"

On the other hand, if it be determined that the community relation, being in the nature of a partner-

ship, is included in the partnership provisions of the Revenue Act, then it would fall within the provisions of Sec. 218 (a), reading:

> "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

We must therefore revert, in any case, to the position that the husband and the wife is each an individual and is taxed as such by the Revenue Act which levies a tax "upon the net income of every individual." It is too plain for argument that the net income *of* an individual is the net income *belonging* to that individual. This is the interpretation put upon the Act by the several Attorneys General and it is the plain meaning of the words employed. As said by the present Attorney General in the opinion of July 16, 1927 (35 Op. Attys. Gen. 265), the revenue acts have been so drafted as to tax the community income of the husband, if that income *belongs* to him, and to tax it to the wife if that income *belongs* to her.

In the case at bar, *it happens that appellee, the husband, had no income from any separate estate in the year* 1927. Neither did the wife. Nevertheless, the general question of the meaning of the Revenue Act in taxing individuals is presented to the Court, because the Revenue Act cannot be interpreted in this case without involving the question whether the community income so belongs to the husband that, if he has also a separate income, the two are to be added together and taxed to the husband as an entirety. To tax the husband on the entire income plus his separate income would not only be an injustice, and contrary, we submit, to the plain intent of the Revenue Act, but, as we point out later, would also be unconstitutional. If the husband could be held to be a trustee as to that part of the community income accruing to the wife, there is nothing in the trustee provisions of the Revenue Act which would justify *adding such trustee income* to the separate income of the husband and taxing

and surtaxing them as an entirely. The husband might be required to act as a withholding agent if in fact any of the wife's income passed through his hands, but that is not what appellant is asking here.

C.—SINCE CONGRESS HAS NO POWER TO LEGISLATE AS TO DOMESTIC RELATIONS, PROPRIETARY INTERESTS IN PROPERTY AND THE ORIGIN OF OWNERSHIPS (THESE QUESTIONS BEING EXCLUSIVELY WITHIN THE POWERS OF THE STATES), THE ONLY WAY TO GIVE EFFECT TO THE LANGUAGE OF THE REVENUE ACT LEVYING TAXES "UPON THE NET INCOME OF EVERY INDIVIDUAL" IS TO ACCEPT THE STATE LAWS AND DECISIONS AS FINAL ON THE QUESTION OF OWNERSHIP. WHETHER OR NOT CONGRESS COULD CONSTITUTIONALLY DEPART FROM THE STATE LAW GOVERNING OWNERSHIP, IT HAS NOT ATTEMPTED TO DO SO IN THE REVENUE ACT OF 1926 OR IN ANY OTHER INCOME TAX LAW.

Assuming, for the sake of argument, that Congress might undertake to enact specific provisions, by which every possible departure from the common law principles governing husband and wife and the origin of property titles might be met,* Congress has never attempted to do so. The task would be enormous.

Every state in the Union has changed the common law concerning the property rights of husband and wife. The common law system was barbarous and this barbarity has been universally acknowledged in modern times. There is no "common law" state in this regard, no state which has not very seriously changed the rules of the common law concerning husband and wife and their property rights.

What law, therefore, has Congress had in mind in its various revenue acts taxing "the net income *of* every in-

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* by specific provisions for taxation.

dividual?" Plainly, not the common law. Plainly, not an amalgamation or averaging of the multitudinous variety of systems prevailing in the various states some of which are considered more or less "common law" states, and some "community property" states.

Clearly, Congress, in these income tax statutes, has of necessity accepted the property system prevailing *in each state,* regardless of the extent to which the common law has been departed from.

The husband at common law, as a result of the marriage, was entitled to the services of his wife, and consequently to her earnings; and even where a married woman carried on business in her own name, the avails of that business belonged to the husband. An agreement by the husband to pay his wife for performing the ordinary household duties was held at common law to be not only without consideration but to be against public policy.

Glenn v. Johnson, 18 Wall. 476;
Jackson v. Jackson, 91 U. S. 122;
13 Ruling Case Law, 1089.

While in parts of Appellant's brief it seems to be conceded that state statutes and decisions govern the ownership of income, Appellant (brief 16-17) appears to be unwilling to accept these as final, and seeks to have the Court (as we conceive) read into the Revenue Act an authority or permission to depart from the state's own idea of its property system whenever the Court (or possibly the Department) may think "a national system of taxation" requires a re-interpretation of what the state has declared. The community property states are made the field for the application of this theory. We submit, however, that there is no inequality among the states and no ground for departing from absolute adherence to state law in every case involving property or its ownership.

In all of the so called "common law" states, the

federal income tax acts are applied by giving full force and effect to the local statutes and decisions. It would be absurd to say that, in any state where the local statute protects the wife's separate earnings, her property and her recoveries for personal injuries, the wife's income from her earnings or from her choses in action, or other accumulations (accumulated by her during marriage) is assessed as income of the husband, because the state statute departs from the common law. The reason is because Congress necessarily, in enacting these taxing statutes, accepts as final the state rule of property governing husband and wife, whether it be common law or civil law or statutory.

At common law, the husband was entitled to the personal property of his wife, consisting of goods and chattels which she held in possession at the time of the marriage, and also any chattels accruing to the wife after the marriage. The same was true of choses in action belonging to the wife which the husband could reduce to his own possession and ownership at any time during the wife's life.

Bank of America v. Banks, 101 U. S. 240;
13 R. C. L., p. 1051, par. 72;
13 R. C. L., p. 1055, par. 77.

By the rules of the common law, further, marriage gave the husband a freehold tenure in the estates of inheritance of the wife, and the right to the rents and profits during their joint life.

Bank of America v. Banks, 101 U. S. 240.

Of course, none of these provisions of the common law are given any weight whatever in administering the federal income tax laws where a different rule of property is prescribed by the local state statute. Why? For the reason that each state has the absolute right to change the common law and to establish its own system of property rights of husband and wife.

Smith v. Alabama, 124 U. S. 465.

Consequently, in determining *of* what individual an income is, we must have regard solely to the state law in each of the several forty-eight states, regardless of what is the law in some other state or what was the common law. Congress, in enacting these statutes, had fully in mind the varying provisions of law in the various states, and intended that those respective laws should control regardless of any differences in the law of one state or another. Unless this principle is adhered to, the whole subject becomes chaos.

The contention of the Government here substantially is that this Court should endeavor to establish some sort of a law of property rights of husband and wife, by "averaging" in some undefined way the laws of the several states, or giving effect in the State of Washington to principles of the common law or statutory provisions enacted in other states, though wholly differing from the statutory provisions in force in Washington. To attempt to do this would be legislation. If legislation along this line would be constitutional, it is for Congress to enact it by specific statutory provisions.

ARGUMENT POINT III. Discussion of departmental and legislative history in connection with the filing of separate returns by husbands and wives in community property states.

A.—BRIEF REVIEW OF THE LEGISLATIVE AND DEPARTMENTAL RECORD RELATING TO THE SEVERAL REVENUE ACTS AND THE ATTEMPTS MADE TO CHANGE THE LANGUAGE THEREOF.

This subject is treated at length in the joint brief filed in this Court by counsel representing the present appellee, Seaborn, and by counsel for appellees in the Texas case,

Hopkins v. Bacon, in the Louisiana case, *Bender v. Pfaff,* and in the Arizona case, *Goodell v. Koch.* However, it seems appropriate here to refer briefly to that feature of the case.

In 1914, under Treasury Decisions 2090 and 2137, the Treasury Department ruled that income taxes are imposed upon each individual and that the separate incomes of husbands and wives should not be combined for the purpose of assessing surtaxes on the aggregate.

In April, 1920, Commissioner's Office Decision 426, 2 C. B. 198, authorized returns dividing income between husbands and wives in Texas and Washington *as to income from accumulated community property,* real and personal.

In August-September, 1920, the Attorney General advised that husbands and wives in Texas may make separate returns dividing equally their total community earnings as well as the income derived from accumulated property (32 Op. Attys. Gen. 298), and this opinion was promulgated as Treasury Decision 3071, 3 C. B. 221.

On February 26, 1921, appeared the further opinion of the Attorney General (32 Op. Attys. Gen. 435) definitely interpreting the revenue acts as applied to the Community property system in the State of Washington, saying that:

> "It appears to be the settled law of that state that the wife has, during coverture as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein" (citing cases).

The Attorney General announced the same principle as applying to the other community property states except California, but repeating that the wife's rights are more fully recognized in the State of Washington, calling attention to the statutory provisions and decisions of that

state, including the wife's power of testamentary disposition of one-half, and the husband's inability to dispose of or encumber real estate without the wife's joining. This holding became established as a regulation in Treasury Decision 3138.

In 1921, an attempt was made at the instance of the Treasury Department to have the revenue act of that year include a paragraph which would make the revenue act read as the government now contends it should read by interpretation. The clause proposed to be inserted was "income received by any community shall be included in the gross income of the spouse having management and control of the community property." The Revenue Act of 1921, as reported in the Ways and Means Committee of the House, and as it passed the House, contained that clause. The Finance Committee of the Senate, in November, 1921, inserted an even more positive clause to the same effect. After extensive debate in the Senate, this proposed addition was refused approval by Congress, and the Revenue Act of 1921 retained the language which had already been interpreted by the Attorney General and the Treasury Department (imposing a tax upon the net income *of every individual*), that being the same language which has since been retained in all the revenue acts, including that of 1926. The debates show that Congress was fully aware of the practice of divided individual returns in the community property states, established pursuant to the Attorney General's several opinions.

Again, in 1923, the House Bill which later became the Revenue Act of 1924, as introduced in the House, contained the same proposed new provision which would include community income as a part of the gross income of the spouse having the management and control of the community property. This provision got no farther than the Committee on Ways and Means of the House, which reported the Bill with the proposed new clause eliminated.

The congressional debates are referred to in the separate joint brief filed by counsel in the four pending cases.

Thus, ever since 1920, by departmental construction and regulations, approved by congressional action, husbands and wives in the seven community property states (not including California) have filed individual returns, dividing the community income, each spouse returning and paying taxes on one-half of that income. The Treasury Department (as pointed out in the *Robbins* case) ruled to the contrary as to California. As to the other seven community property states, it has been the established practice for ten years, and is the practice now in force.

The chronological table, Appendix B of this brief, shows the principal facts in this connection.

B.—PURSUANT TO THE REPEATED HOLDINGS OF THIS COURT THAT, IN THE INTERPRETATION OF A DOUBTFUL OR AMBIGUOUS STATUTE, THE UNIFORM EXECUTIVE CONSTRUCTION AND ADMINISTRATIVE PRACTICE WILL BE GIVEN GREAT WEIGHT AND THAT THE CONGRESSIONAL RE-ENACTMENT OF A STATUTE IN LANGUAGE WHICH HAS PREVIOUSLY RECEIVED A UNIFORM EXECUTIVE CONSTRUCTION AMOUNTS TO AN ADOPTION BY CONGRESS OF THAT CONSTRUCTION, THE NOW EXISTING PRACTICAL CONSTRUCTION OF THE REVENUE ACTS SHOULD BE UPHELD AND FOLLOWED.

The proposition above stated involves two distinct elements, namely, the great weight given by the courts to the construction of a statute shown by continued administrative interpretation and procedure, and the effect given to a re-enactment of a statute in language which has previously received executive construction. In many cases, however, this Court has applied both principles in unified form.

The first part of the proposition is illustrated by the holding of this Court in *New York v. Illinois,* 278 U. S. 367, to the effect that:

"Nothing is more convincing in the interpretation of a doubtful or ambiguous statute than uniform, administrative practice for a series of years."

To the same effect are:

Copper Queen Mining Co. v. Arizona Board of Equalization, 206 U. S. 474;

United States v. Sweet, 189 U. S. 471;

United States v. Johnston, 124 U. S. 236;

United States v. Farrar, ... U. S. .... (May 26, 1930);

Luckenbach S. S. Co. v. United States, 280 U. S. 173;

Lucas v. American Code Co., 280 U. S. 445;

United States v. Midwest Oil Co., 236 U. S. 459, 472, where the court said:

"Government is a practical affair intended for practical men. Both officers, law makers and citizens naturally adjust themselves to any long continued action of the Executive Department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a serious and quieting rule that in determining the meaning of a statute or the existence of a power weight should be given to the usage itself, even when the validity of the practice is the subject of investigation."

As to the second part of the above stated proposition, namely the effect of the re-enactment of a statute by Congress after it has received executive construction, the principle is well stated in *United States v. Cerecedo Hermanos,* 209 U. S. 338, where the court said:

"And we have decided that the re-enactment by Congress, without change, of a statute which had pre-

viously received long-continued executive construction, is an adoption by Congress of such construction."

To the same effect are the following cases:

Komada v. United States, 215 U. S. 392;
Heald v. District of Columbia, 254 U. S. 20;
National Lead Co. v. United States, 252 U. S. 140;
Brewster v. Gage, 280 U. S. 327;
United States v. G. Falk & Brother, 204 U. S. 143;
Lash's Products Co. v. United States, 278 U. S. 175;
Provost v. United States, 269 U. S. 443.

In the case last cited the court said:

"The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them."

The Court noted that the regulations were of special weight because "prepared by the Department, charged with the duty of enforcing the Act."

Where the statute directs the Secretary, as the head of the Department, "to make the necessary regulations to carry out the purposes" of the enactment, the interpretation of the Department acquires additional strength as these regulations have the force of law.

Jacobs v. Pritchard, 223 U. S. 200.

The existing practice of individual returns by husband and wife dividing the community income has prevailed for ten years in seven states and has produced no difficulty or friction whatever. Taxation being a practical matter, it is evident that the tax payers in these several states have adjusted their affairs to fit the regulations and rulings so made. Congress has by its direct action refused to change the language of the Revenue Acts which have been constantly interpreted to sustain the prevailing practice. If there ever was a situation calling for the application of the principles above stated, this case is such a case *par excellence.*

Further facts and argument in support of this point (departmental and legislative history) are given in the Joint Brief filed herein by counsel for appellees in the four pending cases.

ARGUMENT POINT IV. The decision in the *Robbins* Case, 269 U. S. 315, is not in point in the present case which concerns the federal taxation of community incomes in the state of Washington.

A.—THE FUNDAMENTAL DIFFERENCES BETWEEN THE COMMUNITY PROPERTY SYSTEM PREVAILING IN THE STATE OF WASHINGTON AND THAT PREVAILING IN CALIFORNIA REQUIRE THE HOLDING THAT THE OPINION IN THE *ROBBINS* CASE IS NOT HERE APPLICABLE.

In the *Robbins* case it is decided that the entire community income in California is the property of the husband and should be taxed to him. This is based upon the proposition that the wife in California has no such vested property rights in the community income as to entitle her to return one-half thereof as her own. In other words, it was decided that the community income in California was not, as to any part thereof, the income of the wife under the Revenue Act of 1918. It is recognized in the opinion that there is a distinction between the law of California and that of other community property states, as shown by commentators and the action of the Treasury Department, the Court citing the Treasury regulations which make a distinction between California on the one hand and the other community property states on the other.

But in the final paragraph of the *Robbins* case the opinion considers in detail a number of the provisions of the California law and arrives at the conclusion that there

was power and intent on the part of Congress to tax the entire community income to the husband by reason of the particular provisions of the California law. The Court then recites those California provisions.

None of the reasons stated in the final paragraph of the opinion in the *Robbins* case leading to the conclusion therein stated is applicable to the State of Washington, whose laws contain none of the provisions mentioned by the Court as existing in California.

The following summary demonstrates this:

(a) Under the statutes and decisions of the State of Washington it is not true that the husband alone has the disposition of the community fund. As to real estate he can neither convey, mortgage nor lease it without the wife's joinder, vitally differing from California. As to personal property his power of control is merely that of an agent, and he is held to the rules of agency. The "obvious purpose" of the Washington law is to make the interest of the two spouses equal.

Schramm v. Steele, 97 Wash. 309;
Olive Co. v. Meek, 103 Wash. 467;
Holyoke v. Jackson, 3 Wash. Ter. 235;
Mabie v. Whittaker, 10 Wash. 656;
Warburton v. White, 176 U. S. 484 (from Washington);
Buchser v. Buchser, 231 U. S. 157 (from Washington);
Kaufman v. Perkins, 114 Wash. 40.

(b) In Washington the husband cannot spend the community fund substantially as he chooses, and it is not true that if he wastes it in debauchery the wife has no redress.

Stewart v. Bank of Endicott, 82 Wash. 106;
Marston v. Rue, 92 Wash. 129;
Parker v. Parker, 121 Wash. 24;
Schramm v. Steele, 97 Wash. 309.

(c) The husband and wife in Washington are made by

the community property statute jointly and severally liable for all expenses of the family, including the support and education of the children, thus confirming the idea of the universal partnership.

Remington Comp. Stat. Wash., Sec. 6906;
Hector v. Hector, 51 Wash. 434.

(d) In a suit for separate maintenance in Washington the existence of community property (in which the wife is expressly held to have a half interest) is the controlling consideration.

Kimble v. Kimble, 17 Wash. 75;
State ex rel. Lloyd v. Superior Court, 55 Wash. 347.

(e) Neither is it true in Washington that the community property while liable to be taken for the husband's debts, is not liable to be taken for the wife's. In Washington the community property cannot be taken for the husband's separate debt, no more than it can be taken for the wife's separate debt, whereas in California the community property, real and personal, is liable for husband's separate debt.

Olive Co. v. Meek, 103 Wash. 467;
Snyder v. Stringer, 116 Wash. 131;
Coles v. McNamara, 131 Wash. 691;
Peterson v. Zimmerman, 142 Wash. 385.

(f) In order that community property in Washington may be taken for a debt contracted by either husband or wife, the debt must be shown to be a debt contracted in behalf of the community, and both husband and wife are individually entitled to their day in court on the determination of this question. A judgment against the husband alone does not settle the point.

Littell Mfg. Co. v. Miller, 3 Wash. 480;
McDonough v. Craig, 10 Wash. 239;
Allen v. Chambers, 18 Wash. 341; 51 Pac. 478;
Day v. Henry, 1 Wash. 61;
Brotton v. Langert, 81 Wash. 73.

(g) In Washington the wife's actual vested interest enables her to dispose of by will, or leave to her heirs, *her half* of the community property. She may will her one-half to strangers or to any of her friends or to charity or otherwise without limit. Rem. Code, Sec. 1342 (Appendix A, page 143. If the wife dies and the husband survives, the wife's legatees, devisees or children immediately take possession of the wife's *half of the community property* and of all community business connected therewith. By the California law, as construed in the *Robbins* case, the directly opposite rule prevails; the death of the wife leaves the husband in full possession of the title and enjoyment of the community property. In California the wife cannot dispose by will of any interest in the community property prior to the death of her husband.

(h) The several sections of the Washington Statutes (Appendix A, pages 135-143) recognize fully the actual ownership by the wife of her interest in the community property, and the Courts are outspoken in protecting that interest against invasion by the husband other than by his exercising the statutory power of attorney giving him limited authority of management and control. Certain of these sections expressly provide (Sec. 10572, 10575) that either spouse may convey to the other his or her community interest in the community property.

(i) In the *Robbins* case the Court observed that he who has all the power should bear the burden. In Washington the husband is very far from having all the power as already shown.

B.—FURTHER CONSIDERATIONS LEAD TO THE CONCLUSION THAT THE *ROBBINS* CASE DID NOT DECIDE ANYTHING INVOLVED IN THE PRESENT CASE, THE COURT NOT HAVING CONSIDERED THE LONG AND UNIFORM EXECUTIVE AND LEGISLATIVE INTERPRETATION OF THE REVENUE ACTS WHICH IS PRESENTED HERE.

The decision in the *Robbins* case was in accordance with the Departmental rulings which had prevailed from the beginning. As stated by the Court in the first part of that opinion, the Treasury Department has made a distinction between California and the other community property states. Naturally, therefore, the long continued Executive construction as to the other seven community property states, strengthened and confirmed by the repeated re-enactments of the statute by Congress and its refusal to change the regulations and practice of divided returns by husband and wife, could not have been considered by the court, either expressly or impliedly, to be wrong (even if it be assumed that the court was advised of all the material facts in that regard). In fact, by upholding the Treasury Department so far as California is concerned, it cannot possibly be claimed that the court has made a ruling applicable to the situation presented here where the Executive and Legislative action support the existing practice for which we argue in Appellee's behalf. From the very nature of the case it is apparent that nothing in the *Robbins* case precludes the Court from now giving full force and effect to the Executive and Legislative construction (following the long and uninterrupted line of cases from this Court which we have cited).

Further, it is to be noted that no change in the existing practice was made by the Executive Department as a result of the decision in the *Robbins* case. The Treasury Department called upon the Attorney General for an opinion, which opinion was written by the present

Attorney General on July 16, 1927. (35 Op. Attys. Gen. 265.) The interpretation placed by the Attorney General upon the *Robbins* decision is entirely in accordance with the views for which we now contend. Among other things, the Attorney General says:

> "Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins,* 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the *system in force in California* in 1918 *was not substantial* enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918."

It is equally plain that the Attorney General did not consider that the question of the power and intent of Congress had been decided by this Court in a way applicable to any other community property state. The Attorney General says:

> "The questions involved *are not matters of construction of the Revenue Acts of the United States,* but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income *if that community income belongs to him,* and to prevent the wife from returning a share of the community income as her own *unless that share belongs to her.* * * * The nature and extent of a wife's interest in community income in any of the states is to be determined from the statutes and decisions of the state."

At a later point in the opinion the Attorney General says:

> "While I have acquired opinions on the subject as a result of the examination of the statutes and decisions of these states and the *proper answer to the ques-*

tion involved may be more evident as to some of the states than as to others, I believe for the reasons stated that it would be inappropriate and ineffective for me to deal with the subject in an opinion with a view to having your regulations and methods of dealing with community income changed."

In view of the fact that the opinion of the Attorney General on which the present practice of divided returns began (32 Ops. Atty. Gen. 435), emphasizes the property rights of the wife in the State of Washington as being pre-eminently established, it is submitted that the answer as to the State of Washington falls within the "more evident" class mentioned in this latest opinion.

It is evident that the Attorney General, in rendering this opinion in July, 1927, did not consider the decision in the *Robbins* case as having settled any question as to the power and intent of Congress in enacting the Revenue Acts, but that he entertained the view that the decision in the *Robbins* case must be restricted to the particular system existing in California and to those systems embodying the essential features of the California law stated by the Court.

ARGUMENT POINT V. It is established by a long line of decisions of this court that revenue statutes are not to be construed so as to enlarge their scope, but must be given a reasonable and fair application. In cases of doubt with respect to the imposition of a tax, the doubt is to be resolved against the government and in favor of the taxpayer.

This proposition, eminently just and necessary, has often been upheld by this Court.

Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199, affirmed 201 Fed. 918;

American Net & Twine Co. v. Worthington, 141 U. S. 468;

Benziger v. United States, 192 U. S. 38;

Eidman v. Martinez, 184 U. S. 578;

Gould v. Gould, 245 U. S. 151;

Shwab v. Doyle, 258 U. S. 529;

Reinecke v. Gardner, 277 U. S. 239;

Crocker v. Malley, 249 U. S. 223;

Scott v. Western Pac. R. Co., 246 Fed. 545;

United States v. Coulby, 251 Fed. 982, 258 Fed. 27;

United States v. Field, 255 U. S. 257;

Smietanka v. First Tr. & Sav. Bank, 268 Fed. 230, affirmed 257 U. S. 602;

United States v. Merriam, 263 U. S. 179.

In the case last cited, the Court said (repeating substantially the language of *Gould v. Gould,* 245 U. S. 151):

"On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

ARGUMENT POINT VI. Even if it could be held that Congress has the power to impose an income tax on the husband for the income owned by husband and wife under such a system as the community property system of the state of Washington, no such tax could be imposed until Congress should affirmatively legislate to that effect.

This proposition is really included, as a corollary, in the proposition last stated concerning the rule of construction applicable to taxing statutes.

Smietanka v. First Tr. & Sav. Bank, 268 Fed. 230; affirmed 257 U. S. 602.

In this case the Court declared that income held and accumulated by a trustee for the benefit of unborn and unascertained beneficiaries, not having been made taxable by any specific language of the Income Tax Law, such omission could not be supplied by judicial construction. The Court said:

> "This case is not unlike that of *United States v. Field,* 255 U. S. 257. * * * The government sought to tax property passing under a decedent's testamentary execution of a general power of appointment. * * * In the later act, such property was expressly included. This was thought by the court to show at least a legislative doubt whether the earlier act included such property. This court said (p. 264) that it would have been easy for Congress to express a purpose to tax such property, but it had not done so. In the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries, or for the trust or the estate. But Congress did not do so. In the next Act, it did so. We cannot supply the omission in the earlier Act."

ARGUMENT POINT VII. To construe the revenue act of 1926 in accordance with the contentions of appellant would render that act unconstitutional so far as concerns the parts of the act now in controversy. It is the duty of the court so to construe the act (a) as to preserve its constitutionality, and (b) to avoid any construction that would create grave doubt of its constitutionality.

A.—STATEMENT OF THE CONSTITUTIONAL PROVISIONS WHICH WOULD BE INFRINGED BY CONSTRUING THE REVENUE ACT IN ACCORDANCE WITH THE CONTENTIONS OF APPELLANT.

To construe the Revenue Act in accordance with the contentions of appellant would violate the third clause of Sec. 2 of Article I of the Constitution of the United States, and the fourth clause of Sec. 9 of Article I. These clauses require that direct taxes shall be apportioned among the several states according to their respective numbers and that no direct tax shall be laid unless in proportion to the census directed by the Constitution to be taken.

Appellant's construction would also cause the revenue act to violate Sec. 8 of Article I, which requires that all duties, imposts and excises shall be uniform throughout the United States. Such construction would also violate the Fifth Amendment to the Constitution, which provides that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. Such construction would also violate the Sixteenth Amendment to the Constitution empowering Congress to pay and collect taxes on incomes.

The violation of the Constitution by adopting the construction sought by appellant arises from the fact that,

under that construction, the revenue act would be inconsistent with these constitutional provisions, in that:

(a) It would require the collection from appellee of a tax based in whole or in part upon the income of Mrs. Seaborn.

(b) It would require the collection from appellee at progressive rates of a tax based not upon his income alone, but upon the combined incomes of appellee and Mrs. Seaborn thereby not only obliging appellee to pay upon an income not his own, but obliging him to pay at a higher rate upon his own income.

(c) It would prohibit appellee and Mrs. Seaborn from filing separate income tax returns including therein the income only belonging to and received by them, respectively (as defined by local state law), which right is allowed under the Revenue Act to citizens of other states, and would violate the uniformity of taxation clause of the United States Constitution.

(d) It would provide for the taking of the property of appellee without due process of law and deny to him the equal protection of the laws.

(e) So far as concerns all of the income taxed, other than salary, it would levy and require appellee Seaborn to pay a direct tax (*Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, and subsequent cases) upon the real estate and invested personal property owned by two persons, appellee and his wife, and upon the fruits and revenues thereof, in that a tax upon the income of real estate and invested personal property is a direct tax and must be apportioned among the several states in proportion to census, unless it is the income solely of the person taxed, in which case the Sixteenth Amendment permits the income tax to be laid against the owner of the income without apportionment (meaning the owner as defined by local state law).

(f) The reasons stated in the foregoing paragraphs apply

also to the tax assessed to appellee Seaborn upon the $15,000 of salary, for the reason that the Revenue Act of 1926 does not purport to levy an excise tax upon salaries applicable uniformly throughout the United States, but attempts to levy an income tax upon salaries *as the property of the person taxed,* as in the case of real estate and invested personal property, and the Act does not attempt to prescribe a constitutional method of taxing to the husband alone income belonging (by state law) to the husband and wife. As the salary was the actual property of appellee and his wife from the moment of its earning, it cannot be taxed to appellee alone unless possibly by some form of excise which would operate uniformly throughout the United States for the taxation to the husband alone of salaries belonging to husband and wife,

(g) The Act construed as contended by appellant would as to appellee, be arbitrary and capricious, in that it would use, as a basis and as the subject of the tax assessed against him at progressive rates, the combined incomes of himself and his wife, instead of the income of appellee alone.

(h) As to all of these objections, ownership must be taken conclusively as defined by local state law. If an excise is based on *something other than ownership,* it must *define the thing excised* so as to operate *uniformly on that thing* throughout the United States.

B.—IT FOLLOWS FROM THE CASE OF *POLLOCK V. FARMERS LOAN & TRUST COMPANY*, 158 U. S. 601, AND THE CASES WHICH HAVE FOLLOWED IT, THAT TAXES ON RENTS, INCOME OR PROFITS OF REAL ESTATE AND PERSONAL PROPERTY ARE DIRECT TAXES UPON THE PROPERTY ITSELF WHOSE INCOME IS TAXED. IF, THEREFORE, UNDER STATE LAW, THE REAL ESTATE AND PERSONAL PROPERTY SO TAXED ARE OWNED BY TWO PERSONS, AN INCOME TAX THEREON CANNOT BE LEVIED WITHOUT APPORTIONMENT AGAINST ONLY ONE OF THE OWNERS, AS THE SIXTEENTH AMENDMENT DOES NOT CHANGE THE DIRECT NATURE OF THE TAX WHICH NECESSARILY FOLLOWS OWNERSHIP, BUT ONLY DISPENSES WITH THE NECESSITY OF APPORTIONMENT.

Pollock v. Farmers Loan & Trust Company, 158 U. S. 601, holds in the clearest terms that the tax assessed in this case upon the rents, issues and profits of the accumulated real estate and personal property is a direct tax on all of that property. It follows, therefore, that such tax, to be valid, would have to be apportioned unless the tax falls within the provisions of the Sixteenth Amendment. That amendment, however, it has been distinctly held by this Court, *does not enable Congress to define incomes* and does not change the direct character of an income tax as fixed by the *Pollock* case, which *direct tax must be based on ownership.*

Of course, we must look entirely to state law to ascertain who is the owner of the real and personal property whose income is taxed.

Questions of control, management, and the like, are without significance in this connection. Ownership is the only test.

In *Eisner v. Macomber*, 252 U. S. 189 (the second stock dividend case), the opinion of the Court, referring

to the first stock dividend case (*Towne v. Eisner*, 245 U. S. 418) said:

> "The court treated the construction of the Act (of October 3, 1913) as inseparable from the interpretation of the 16th Amendment; and having referred to Income Tax Cases (*Pollock v. Farmers Loan & Trust Co.*) 158 U. S. 601, 39 L. Ed. 1108, and quoted the Amendment, proceeded very properly to say (p. 704): 'It is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, *unless it is in fact income.*' "

Later in the opinion in *Eisner v. Macomber* (p. 205), the Court says:

> "The 16th Amendment must be construed in connection with the taxing clauses of the original constitution and the effect attributed to them before the Amendment was adopted. In Income Tax cases (*Pollock v. Farmers Loan & T. Co.*) 158 U. S. 601, under the Act of August 27, 1894, *it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership;* and that Congress could not impose such taxes without apportioning them among the states according to population, as required by Art. 1, Sec. 2, cl. 3, and Sec. 9, cl. 4, of the original Constitution.
>
> "Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the 16th Amendment was adopted, in words lucidly expressing the object to be accomplished; 'The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states and with-

out regard to any census or enumeration.' As repeatedly held, this did not extend the taxing power to new subjects, but *merely removed the necessity which otherwise might exist for an apportionment* among the states of taxes laid on income. *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 17, 19, 60 L. ed. 493, 501, 502; *Stanton v. Baltic Min. Co.*, 240 U. S. 103, 112 *et seq.* 60 L. ed. 546, 553; *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 172, 173, 62 L. ed. 1049-1051.

"A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall *not be extended by loose construction*, so as to repeal or modify, except as applied to income, those provisions of the constitution that require an apportionment according to population for direct taxes upon property, real and personal. *This limitation still has an appropriate and important function, and is not to be over-ridden by Congress or disregarded by the courts.*"

Later, in the same case, the Court defined income as follows:

"'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle* case (*Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 185)."

The Court also said:

"Here we have the essential matter: * * * a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal; *that* is income derived from property. Nothing else answers the description."

(The italics in the last quoted paragraph are those of the Court).

The dissenting opinion in *Eisner v. Macomber* puts in clear relief the substantial holding of the Court, the dissenting opinion taking the ground that the word "incomes" in the Sixteenth Amendment was used, not in the sense announced in the opinion of the Court, but in a broader sense conforming to a supposed common understanding among the public. Nevertheless the above quoted declaration as to the meaning and effect of the Sixteenth Amendment has been expressly reaffirmed by this Court and is the established law.

In *Bromley v. McCaughn*, 280 U. S. 124, this Court sustained the validity of the gift tax imposed by Sec. 319 (a) of the Revenue Act of 1924. In the opinion of the Court, it is said:

> "Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons *because of their general ownership of property*, may be taken to be direct (*Pollock v. Farmers Loan & T. Co.*, 157 U. S. 429, 39 L. Ed. 759, 158 U. S. 601, 39 L. Ed. 1108), this court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property *or the exercise of a single power over property incidental to ownership*, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class."

In the case at bar, it is not claimed by appellant, nor could it be claimed, that there is a single word in the Revenue Act of 1926, applicable to the tax now in question, imposing an excise upon a particular use of property or the exercise of any single power over property incidental to ownership. The plain fact is that it is ownership

of the income (necessarily including the ownership of the real and personal property which gives rise to the income) that is the basis of the tax now before the Court. How is this ownership to be determined? Necessarily, by state law, because the state is the only authority having any power to legislate on the subject of property ownership and the property rights of married persons.

In the case of *Bromley v. McCaughn,* 280 U. S. 124, the Court added:

> "It is true that in each of these cases the tax was imposed upon the exercise of *one* of the numerous rights of property, but each is clearly distinguishable from a *tax which falls upon the owner merely because he is owner,* regardless of the use or disposition made of his property. See *Billings v. United States, supra.*"

Later in the opinion, the Court said:

> "It (the gift tax) falls, rather, into that category of imposts or excises which, since they apply only to a *limited exercise* of property rights, have been deemed to be *indirect* and so valid although not apportioned.
>
> "The uniformity of taxation throughout the United States enjoined by Article 1, Section 8, is geographic, not intrinsic."

In *Taft v. Bowers,* 278 U. S. 470, this Court upheld the validity of Secs. 202 and 213 of the Revenue Act of 1921, which require the donee of a gift to pay an income tax on the capital gain, based on the cost of the gift to the donor. In the unanimous opinion of the Court, it is said:

> "Under former decisions here the settled doctrine is that the 16th Amendment confers *no power upon Congress to define and tax as income* without apportionment something which theretofore *could not have been properly regarded as income.*"

These decisions, we submit, establish beyond question that, so far as concerns the income of accumulated real or

personal property, the effect of the Sixteenth Amendment is merely to permit the direct tax, imposed on the income of that property, to be levied without apportionment. The tax is still a direct tax on the property itself, real or personal. Further, the tax is imposed because of ownership, as this Court has emphatically declared. It is not a question of management or control, but solely of ownership. That ownership must be determined by state law.

In ruling upon an analogous question of state taxation, this Court said, in *Home Savings Bank v. Des Moines*, 205 U. S. 503:

> "Taxes are assessed against persons upon the property which they own, not upon property which others own. We should be reluctant to suppose that there has been any departure from this principle in this law."

The line separating federal jurisdiction from state jurisdiction in this connection is very clear. There is no twilight zone. In determining ownership, the origin of titles to property, the transfer of titles, and the effect of the marriage relation on the property rights of the spouses, are all subjects of legislation purely within the sovereign powers of the states. Congress has no more to do with those subjects than if the Federal Union had not been formed.

On the other hand, the levying of federal taxes is within the power of the federal government, subject to such limitations only as the federal constitution prescribes. One of the limitations here is that an income tax on the rents, issues and profits of real or personal property is a direct tax on that property and such tax falls upon the owner under the established construction of the Sixteenth Amendment.

The Sixteenth Amendment, and the federal statutes passed pursuant thereto, must be applied separately to the rules of property in each state. There is no attempt,

either in the Sixteenth Amendment or in the laws enacted under it, to arrogate to the Federal Government any of the states' fundamental powers. The Sixteenth Amendment was adopted *in view of the diversity of the property systems in the several states,* and the Amendment takes those different property systems as it finds them. The same is true of the Revenue Act of Congress.

The Sixteenth Amendment is to be read, as applied to the laws of each state, precisely *as if the laws of that state prevailed in every one of the forty-eight states.* The law of one state can have no effect in applying the Sixteenth Amendment or the Revenue Acts in any other state. This individual sovereignty of the several states, preserving locally the absolute right to legislate on all questions of property, is one of the most important points in our federal system.

The federal system cannot survive unless the rights of the states in this regard are respected and upheld. We therefore assert that both the Sixteenth Amendment and the federal revenue acts are to be construed, as applied to ownerships in the state of Washington, precisely as if the community property system prevailing in the State of Washington prevailed in every one of the forty-eight states in identical terms. There is no other principle upon which the line of demarcation between the federal and state powers can be upheld.

So far, we have discussed this subject as if the income were all derived from accumulated real and personal property. There was a salary of $15,000, which was not the direct result of prior accumulations. However, this salary, from the moment of its inception, belonged to both husband and wife, Rem. Code, Sec. 6892, Appendix A, page 135. The husband could not have assigned it without the written joinder of his wife (Rem. Code, Sec. 7598, App. A, p. 138). No part of the salary could be gar-

nisheed or levied upon for the husband's separate debt. *Coles v. McNamara,* 131 Wash. 691. The husband could not, by any possibility, convert the salary into his separate property nor use it for his separate purposes. The wife could dispose of one-half of the salary at any time by testamentary disposition. If the huband died before the salary was collected, the wife would take into possession one-half thereof; and if the wife died before the salary was collected, the wife's legatees or heirs would take one-half thereof. There was no ownership of the salary in the husband such as is required to justify a direct tax against him for more than one-half thereof.

Further, even if it be assumed that the salary would have been the subject of an excise tax, under the ruling in *Pollock v. Farmers Loan and Trust Co.,* Congress has made no attempt to levy any tax thereon, *based upon anything else than ownership.* Congress has not undertaken to levy an excise upon any exercise of *the right of management* or any other exercise of *single incidental rights,* such as was sustained by this Court in *Bromley v. McCaughn,* 280 U. S. 124.

Sec. 210 (a) of the Revenue Act of 1926 imposes a tax upon "the net income *of* every individual."

Sec. 213 (a) defines income and treats in one unified way, gains, profits and income derived from salaries, wages, professions, trades, businesses, commerce, or sales or dealings in property, and from interest, rents, dividends, securities and transactions of business. All of these are joined together and a tax is levied upon the income of each individual, based upon such aggregate income. Unless, under state law, items of such aggregate income are income *of* the individual taxed, the Revenue Act does not purport to tax them.

If it be conceded, for the sake of argument, that Congress might have levied some sort of an excise tax upon

the exercise by husbands of the power of management of the wife's property, such excise tax would have to be defined by some appropriate words, and the imposition would have to be *uniform throughout the United States.* Neither by the Revenue Act of 1926 nor by any other act, has Congress undertaken to levy any such excise. For the reason stated, it would be an unconstitutional construction of the Revenue Act of 1926 to hold that appellee Seaborn can be required to pay a tax and surtax based upon the united incomes which, under the laws of the State of Washington, belong to him and his wife.

To tax and surtax appellee upon this combined income would not only be violative of the constitutional provisions above mentioned, but would be so capricious and arbitrary as to constitute a taking of appellee's property without due process of law, and denying to him the equal protection of the law. The tax would fall within the principle of condemnation of such taxing laws announced by this court in *Nichols v. Coolidge,* 274 U. S. 531. It is not within the congressional power to lay a burden upon appellee because of property or income, the ownership of which, by state law, is in him and his wife. As this Court said in *Nichols v. Coolidge*:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character, and beyond recall."

The Court again said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. Union P. R. Co.,* 240 U. S. 1; *Barclay v. Edwards,* 267 U. S. 442. See also *Knowlton v. Moore,* 178 U. S. 41, 77."

Like reasoning was applied in *Llewellyn v. Frick*, 268 U. S. 238.

It is to be constantly borne in mind, as shown on p. 38 of this brief, that it is impossible to treat the community income as if it were all the earnings of the husband. Community income is the result of a marital property status enacted by state law. It includes not only the earnings of the husband, but the earnings of the wife, recoveries for personal injuries incurred by the wife or by the husband, and the rents and profits of their joint accumulations. How absurd to say that Congress has, by the Revenue Act of 1926, determined to tax all of these items of income to the husband in states where community property laws exist (which laws deny the separate ownership of the husband), but to tax them separately to husbands and wives where other and dissimilar statutes and systems of property prevail, which other statutes and systems will be given full effect. Such a construction of the Act would make it as arbitrary, unequal and unfair as it is possible to imagine when applied to the different property systems in the different states.

In many of the so-called common law states, there are statutes expressly providing that such property items as the wife's earnings, her profits in trade or business, her professional salary, her professional fees and other items of gain (including income derived from the wife's recoveries for personal injuries) and the wife's share of the income from property held by the husband and wife in common, as well as the income of property transferred by the husband to the wife, constitute property of the wife alone. In Washington, the corresponding statutory provision is to pool such items accruing to the wife with like items accruing to the husband, and to call this joint pool community property. Both spouses equally enjoy that property and neither can use it for his or her separate purposes.

To call this joint property the sole property of the husband would be to create, by judicial decision, an artificial situation not based on statute or the common law.

The Sixteenth Amendment, the prior decisions of this Court, and the language of the Revenue Acts require the holding that, as to the income of accumulated real and personal property, the tax on the "net income of every individual" is a direct tax on the property producing the income, and must follow ownership. As to salaries, the tax being imposed in the same language and in the same clauses (with no distinction and no reference to a different kind of excise), it must have been the Congressional intent that ownership is the basis of the tax on salaries, as well. See the definition of "net income" in Sec. 212 (a) and Sec. 213 (a).

C.—IT IS THE DUTY OF THE COURT TO CONSTRUE ACTS OF CONGRESS IN SUCH A WAY AS TO AVOID GRAVE DOUBTS OF THEIR CONSTITUTIONALITY. THAT CONSTRUCTION SHOULD BE ADOPTED WHICH KEEPS AWAY FROM SERIOUS CONSTITUTIONAL DOUBTS.

The construction which has been placed upon the Revenue Acts by the Attorney General's opinion of 1920, and the regulations of the department and subsequent practice, obviously compels the conclusion that the Revenue Acts are open to the construction so given to them. The opposite construction now contended for by appellant must, to put the matter as favorably as possible to appellant, require the consideration by the Court of the serious constitutional questions hereinbefore stated.

Congress has not enacted, in any of the revenue acts, words which compel the construction which appellant now urges. Appellant's brief admits that there is no specific

reference in the statute to income from community property.

Under such circumstances, the recognized practical construction of the revenue acts should be followed, rather than to require the Court to consider and decide questions affecting interpretation of the constitution. This conclusion follows from the principles laid down in the following cases:

Blodgett v. Holden, 275 U. S. 142 (concurring opinion);

Reinecke v. Northern Trust Co., 278 U. S. 339;

United States ex rel. Atty. Gen. v. Delaware Co., 213 U. S. 366, 407;

United States v. Standard Brewery, 251 U. S. 210, 220;

United States v. Jin Fuey Moy, 241 U. S. 394, 401, 402;

Panama R. Co. v. Johnson, 264 U. S. 375, 390.

In *United States v. Delaware & Hudson Co.,* 213 U. S. 366, 407-408, the rule is stated as follows:

> "The rule plainly must mean that, where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which, such questions are avoided, our duty is to adopt the latter."

ARGUMENT POINT VIII. Answer to contentions asserted in appellant's brief.

A.—APPELLEE'S ANSWER TO APPELLANT'S POINT II, ASSERTING THAT, WHERE THE HUSBAND HAS CONTROL OVER AND RIGHT TO ENJOY THE ENTIRE COMMUNITY INCOME, HE IS REQUIRED TO INCLUDE IT IN HIS RETURN FOR FEDERAL INCOME TAX PURPOSES.

The first fallacy in the foregoing contention is the erroneous premise that, in the State of Washington, the husband can enjoy the entire community income, and ignoring the fact that his control is strictly limited by the statutes and decisions. Further, appellant overlooks the fact that the Federal Income Tax Acts have been so phrased as to apply distributively and particularly to every property system existing in any of the forty-eight states. There is no diversity of language in any of the revenue acts singling out community property for special legislation, though, of course, the existence of that system in seven states was at all times well known, both inside and outside of Congress.

It is important here to note that appellant's brief passes over, with the briefest possible reference in a footnote, the vitally important fact that Congress, in enacting the Revenue Acts of 1921 and 1924, expressly refused to include in these acts clauses that would single out community income and tax all of it to the spouse having management and control. This Congressional action, coupled with the executive administration and interpretation of the revenue acts applied to the community property states, is the most outstanding fact in the present record. We find no discussion of the point in appellant's brief. See this brief, pp. 61-64, and the joint brief filed by counsel for the taxpayers in the four pending cases. Also this brief, Appendix B, pp. 145-156.

Appellant apparently treats the opinion of the Attorney

General of 1921 (32 Op. Atty. Gen. 298, 435) upholding the right of divided returns as to community income as erroneous and as not correctly interpreting the local law. The Washington Supreme Court having for years, in case after case, declared that the ownership of community property is in both spouses equally, those holdings do not involve technicalities. Ownership cannot be passed over as a technicality if regard is to be had to *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429; *Eisner v. Macomber*, 252 U. S. 189, and *Bromley v. McCaughn*, 280 U. S. 124. We cannot concur in Appellant's statement that "nowhere in the Revenue Act of 1926, or in any previous Revenue Act, have there been set forth the proprietary rights which an individual must have in the particular income." All of the Revenue Acts use as the basis of the tax the language "the net income *of* every individual." All these acts were drawn and passed by Congress having in mind the settled law that taxes upon the income of real or personal property are direct taxes and must be based upon ownership. The proprietary rights therefore are defined in the acts as ownership and nothing else.

For further discussion of ownership as distinguished from management, see *infra*, pages 118-124.

B.—ANSWER TO APPELLANT'S CONTENTION THAT THE *ROBBINS* CASE AND *CORLISS V. BOWERS*, 281 U. S. 376, AND *LUCAS V. EARL*, 281 U. S. 111, AND OTHER CASES SUPPORT THE VIEW THAT MANAGEMENT AND CONTROL RATHER THAN OWNERSHIP ARE CONTEMPLATED BY THE REVENUE ACT OF 1926 AS THE BASIS OF TAXATION.

As to the *Robbins* case, we have already treated that case at some length in this brief, page 67, and we find nothing in it supporting Appellant's contention so far as concerns community incomes in the State of Washington.

The interest of the wife in community property in the State of Washington is not a mere formal right of ownership. The Supreme Court of Washington in the many cases cited and this Court in *Warburton v. White* (176 U. S. 484) make it clear that the wife's ownership is actual and real, both in its vested character and in its enjoyment, notwithstanding that for purposes of practical operation a larger share of the management as to a part of the property is given to the other spouse.

The implication that the husband in the State of Washington is "the person exercising or having the right to exercise substantially all of the rights of control and enjoyment" is without legal foundation.

(a) The husband in the State of Washington in the case of real estate cannot either sell or lease or mortgage it, or otherwise make it rent-producing (other than by a tenancy at will) without the joinder of his wife in the instrument (Rem. Code, Sec. 6893, Appendix A, p. 136) (See cases cited under Argument Point I of this brief, p. 22).

(b) As to personal property, the husband can invest it, sell it and change its form, but he cannot use it for the payment of his debts contracted before marriage, or in satisfaction of a tort committed by him before or after marriage unless connected with the carrying on of community business, or use it for the payment of his voluntary obligation (such as accommodation paper) not contracted in the carrying on of the community business.

(c) The husband cannot convert either community real estate or community personal property into anything but community property (since the common ownership would attach to the result of the sale or disposition, *Warburton v. White,* 176 U. S. 484, 497).

(d) The husband cannot dispose by will of more than one-half of the community property.

(e) The wife, despite all opposition of the husband, can

dispose by will or leave to her own children as her heirs one-half of the community property. Though the husband survive and be engaged in the management of an important business, the wife's half therein is expressly recognized by the Statute of Wills and Descents, and upon her death her half passes at once to her legatees or to her children (Rem. Code, Sec. 1342, Appendix A, p. 143).

(f) The husband's right of control and management is not a right of enjoyment in any sense, as his powers are limited to managing and controlling the property as if he held a power of attorney for that purpose (See authorities cited under Point I of this brief, pp. 23-28).

These considerations make it plain that it is very inapt language to attempt to express the husband's powers with reference to community property in Washington "as substantially all of the rights of control and enjoyment."

The plain fact is that the rights of control and enjoyment of community property in Washington are in both spouses, the husband being given by the statutes somewhat broader powers of control and management than the wife, but no greater powers of enjoyment. He can never make the community property his own.

Appellant's argument in endeavoring to show that the rights of the husband under the Washington statutes and decisions amount to substantial ownership, while asserting that the wife's rights (because coupled with a lesser control as to personal property) are not an actual property interest, attempts to set up an inconsistent rule. The applicable principle is plain when we consider that the actual ownership is in both spouses, both having rights of control, the wife's control being somewhat less than that of the husband. The complete management, control and enjoyment only arise by the exercise of the combined powers given to the husband and wife, neither alone being given unlimited control or enjoyment. The opinion of the At-

torney General of 1920 is thus shown to be the correct interpretation of the community status, and the adhesion to that opinion in subsequent practice is both lawful and just.

The case of *Corliss v. Bowers,* 281 U. S. 376, considers a situation *expressly provided for* by Congress in the Revenue Act. The statute provided that "where the grantor of a trust has, at any time during the taxable year, * * * the power to revest in himself title to any part of the *corpus* of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." This Court said: "There can be no doubt, either, that the statute purports to tax the plaintiff in this case."

The case was that of a grantor who made an instrument conditionally divesting himself of title to the *corpus* of the trust, with a condition of defeasance whereby he could retake the *corpus* at any time. The grantor's parting with the title was never complete, but was only conditional and the statute clearly directed that under such conditions the grantor should be subject to the tax. In the case of community property, there is no change of title, no condition or defeasance clause, and, as to that property, Congress has not attempted to make any such provision in the Revenue Acts as that considered in the *Corliss* case.

Appellant cites *Lucas v. Earl,* 281 U. S. 111. In that case, the husband claimed that by contract he had assigned to his wife certain salary and fees which later were taxed to him as his income. The opinion of this Court is clear that the taxing of salaries to those who earn them cannot be escaped "by anticipatory arrangements and contracts, however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."

It is to be noted that the assignment on which the husband relied, in *Lucas v. Earl,* was really not a valid assignment of earnings (though the decision does not go on

that point) since the earnings did not arise from an employment or contract existing at the assignment date. See Williston Contracts (1920), Sec. 414. Of course, in this decision, the Court was not dealing with a situation where *by law* the title to an earned salary vests in one or more persons. Co-partnerships of attorneys often receive salaries. Such co-partnerships probably invariably receive fees. Where such salaries and fees belong by law to more than one person, they are, of course, invariably taxed to all the persons interested in proportion to their respective interests, without regard to the question of which partner actually did the earning. So, in the case of a salary earned by a minor which belongs to the father, the father is taxed. So it would also be in the case of a husband in a strictly common law state (if any state could be found preserving this unjust provision of the common law) where the wife's earnings are by law the property of her husband. In the *Lucas* decision, the Court considered only the facts before it and did not undertake to say that, where the law fixes the ownership of a salary (especially a law in force before the statute was enacted or the salary earned), the salary is to be taxed to someone not the owner.

Lucas v. Earl is an authority for the holding that attempts to evade the federal taxation statutes by private contracts and arrangements must fail. That case is *not* an authority for the contention that *state property systems,* established and maintained many years before the adoption of the Sixteenth Amendment, *are not controlling* on all questions of property and ownership—that state laws intended to fix and prescribe property rights, though much older than that Amendment and the Revenue Acts, *are on no higher plane than evasive private contracts.*

The distinction between an assignment of salary by contract and the vesting of the title thereto by reason of the law and the family relationship, is similar to the hold-

ing of this Court in *Buchser v. Buchser,* 231 U. S. 157, where the Court said:

> "The special family relations thus created are not like contracts with third persons impliedly forbidden by the Act." (The Public Land Acts.)

As we show elsewhere in this brief (p. 129), in assessing income taxes, the lawfulness of a partnership between husband and wife (in states where such partnerships are authorized by law) is recognized by the Treasury Department, and *full recognition of such partnerships is given in the division of income* between husband and wife for income tax purposes.

We agree with the statement in appellant's brief (p. 16) that "the *Robbins* case has measured the rights of dominion and enjoyment by *exceedingly practical tests.*" Those tests are enumerated at pp. 67-71 of this brief, and, measured by those tests, the rule of the *Robbins* case cannot possibly be applied to the taxpayers in the State of Washington, even if the taxpayers of Washington and the six other community property states did not have also in their favor the departmental construction and the approval of that construction by Congress.

C.—SECTION 223 OF THE REVENUE ACT OF 1926, GIVING THE HUSBAND AND WIFE THE OPTION OF FILING A JOINT RETURN OR SEPARATE INDIVIDUAL RETURNS, IS NOT TO BE IGNORED.

Section 223 gives the husband and wife the option of filing a joint return or of filing separate returns. This is an option for the benefit of the married taxpayers of which such taxpayers may avail themselves or not as they prefer.

It is undoubtedly in view of the fact that the laws in the several states regulating the property rights of husbands and wives are exceedingly multitudinous and varied, that Congress enacted this permissive section 223 which

can be utilized by husbands and wives in every state at their option.

D.—APPELLANT'S DEFINITION (PAGE 16) AS TO WHAT CONSTITUTES OWNERSHIP, IF ACCEPTED AS TRUE, WOULD WHOLLY DEFEAT APPELLANT'S CONTENTION THAT THE HUSBAND IS THE SOLE OWNER OF THE ENTIRE COMMUNITY PROPERTY AND INCOME.

It is asserted in appellant's brief (page 16) that "it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights, and among such substantial rights are the rights of disposing of the income or the source of the income." This idea is expressed for the purpose of drawing the inference that the wife is not an owner, but if adopted it would lead equally to the inference that the husband is not an owner.

If the assertion be taken as true, it is a complete answer to Appellant's entire contention in this case. As we have pointed out (pages 21-32 of this brief), the husband's rights as to community property and income in the State of Washington do not include "the right of disposing of the income or the source of the income" (in the sense of making it his own), and do not include the right of using the income or having it used *for his own benefit.*

There is no method under the law of the State of Washington by which the husband can utilize the community income for his own benefit. The same is true of the source of the income. While he can change the form of the community personal property into other community property, he cannot in any manner make it his own. As to real estate, he can do practically nothing to derive a revenue from it or to convey it without the wife's joinder. He cannot utilize any community property or income to pay his personal debts. He cannot give it away. He cannot use it for his own benefit. As to wills and descent, he can do

only what his wife can do, namely, bestow by will or permit to pass by descent one-half thereof. As to real estate, he cannot sell it or make it substantially productive by a term lease without his wife's joinder. As to personal property, his rights are limited repeatedly by Washington decisions, affirmed by this Court. The actual ownership, as well as the rights of enjoyment, is in both spouses.

> *Bortle v. Osborne* (decided by the Supreme Court of Washington February 24, 1930. Unofficially reported in 285 Pacific Reporter 425).

The community property in the State of Washington has an owner or owners. State statutes and decisions say that the owners are husband and wife. Each spouse owns one-half and there are certain restrictions on alienation applicable to each. If the ownership contemplated by the Revenue Act is to be defined as asserted by appellant, it follows that appellee's view is manifestly correct, namely, that there is a joint ownership of that property by two persons. The husband alone plainly fails to qualify as owner of the entire community property or income under appellant's definition.

E.—ANSWER TO APPELLANT'S PROPOSITION THAT A LIMITED RIGHT TO PREVENT A PARTICULAR DISPOSITION OF COMMUNITY INCOME OR PROPERTY BY THE HUSBAND WOULD NOT BE IMPORTANT FOR THE REASON THAT SIMILAR RIGHTS ARE ENJOYED BY PERSONS IN STATES WHICH DO NOT HAVE A COMMUNITY PROPERTY SYSTEM.

Appellant cites the Utah statutes providing that no assignment of a husband's wages is valid unless assented to by the wife in writing. The difference between the Utah situation and the Washington situation is that, in Washington, *in addition to the statutory clause mentioned by appellant*, the wife has an actual vested interest in the

husband's wages assured by positive statutes declaring her the owner of half thereof, and by the decisions construing those statutes. In Washington, the husband cannot use the wages to pay his prenuptial debt or his postnuptial debt contracted by him for accommodation of others or to pay a judgment against him for his private tort, nor can he in any way dispose of these wages except for the benefit of himself and his wife as a community.

Coles v. McNamara, 131 Wash. 691.

Further, if the wife dies, her legatees or children receive as their own one-half of the wages if uncollected, or one-half of the proceeds thereof if collected and subsisting in any form. The husband's rights are not substantially greater. The reference, therefore, to the wife's interest in community property in Washington as a mere restriction on alienation is not pertinent.

The wife and the husband have equal *property rights* in the community property, with restrictions *applicable to both* as to alienation. These restrictions (the Washington cases hold) do not affect the fact that the title ownership and right of enjoyment is in *both spouses,* in the wife as much as in the husband.

F.—ANSWER TO APPELLANT'S CONTENTION THAT IT IS NOT IMPORTANT THAT THE WIFE CAN PREVENT THE HUSBAND FROM DISPOSING OF MORE THAN ONE-HALF OF THE PROPERTY BY WILL.

Under this head, appellant cites an Oklahoma statute whereby the husband is prevented from bequeathing away from his wife a certain portion of *his* estate. Appellant also cites a Minnesota Statute of Descent, providing that a wife shall inherit a certain interest in the husband's real estate the conveyance of which she has not consented to in writing. Appellant does not note in this connection the im-

portant fact that in Washington all the property now in question is by statute made *the common property of both spouses* and the wife herself can will away or leave to her children (as *her half* of the community property) the half that the husband does not have power to dispose of. The community property system in force in Washington gives her a present ownership, not merely a provision effective

INCOME.

How far the husband's limited right of management and control in the State of Washington is from "the actual command" of the property and income appears from what has been said. When a man cannot use an income for his own benefit, or allow his creditors to take it to pay his own obligations, or convert it into his own property, or exclude

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So far as we can find, no court has ever said or intimated that *the community property system* (often discussed by the courts) is to be confused with *common-law* systems wherein there are statutory restrictions on the power of the husband to devise or convey *his own property* or with provisions by which a wife may bar her claim for dower or its equivalent in *her husband's* estate.

Appellant's discussion under this head relates to states where the husband is the *acknowledged sole owner* of the property concerned. Such considerations are wholly inapplicable to the case of a marital partnership where, as a result of the marriage relation, the law vests in both husband and wife the accumulations that both or either of them make after marriage as a result of the efforts of either or both of them, making the same common property of the two.

portant fact that in Washington all the property now in question is by statute made *the common property of both spouses* and the wife herself can will away or leave to her children (as *her half* of the community property) the half that the husband does not have power to dispose of. The community property system in force in Washington gives her a present ownership, not merely a provision effective at the husband's death.

Appellant's argument overlooks the fact that both in Oklahoma and in Minnesota (and the same may be said of other states whose statutes contain similar provisions) these statutes merely insure to the wife a certain inherited interest in the *husband's estate if she survives him.* Such statutory provisions have nothing to do with the situation where the wife *owns a present half interest* in the common property and if she dies first or whenever she dies, *her* legatees or *her* children become the owners of one-half the property regardless of what the husband may do,—and where, if the husband dies first, the wife retains one-half of all the property, not by descent or by will, *but by continuation of the title which she had during coverture.*

See note attached.

G.—ANSWER TO APPELLANT'S CONTENTION THAT THE PRIME CONSIDERATION SHOULD NOT BE REFINEMENTS OF TITLE, BUT ACTUAL COMMAND OF THE INCOME.

How far the husband's limited right of management and control in the State of Washington is from "the actual command" of the property and income appears from what has been said. When a man cannot use an income for his own benefit, or allow his creditors to take it to pay his own obligations, or convert it into his own property, or exclude

from joint interest in it or its proceeds his marital partner, and possesses only the same right of disposition by will or by inheritance as his marital partner possesses, the situation is far short of "actual command." To find actual command we must combine the rights and powers of both spouses. The actual command cannot be found in either spouse alone.

Appellant discusses that section of the Washington statute giving the husband the power of disposition of *community personal property* as if the word "disposition" were not limited by the context of the section and by the uniform holdings of the Supreme Court to mean a disposition for the benefit of the community or a mere change of form into *other community property.* "Disposition" may have a broad or a narrow meaning. In Washington, it does not mean that the husband can utilize community personal property in any way for his own benefit. Whatever change of form the property undergoes by his "disposition," the resulting product is community property owned by both spouses.

H.—ANSWER TO APPELLANT'S CONTENTION THAT PERMISSION TO DIVIDE THE COMMUNITY INCOME IN THE STATE OF WASHINGTON BETWEEN HUSBAND AND WIFE WOULD BE UNFAIR AS TO TAXPAYERS IN THE OTHER STATES NOT HAVING THE COMMUNITY SYSTEM.

There is no unfairness in fact in the present practice of divided returns established in 1920 as the result of the Attorney General's opinion. In some instances there will be found an advantage to the Washington taxpayers and in many other cases there will be found a disadvantage. On the whole it is hard to say where the preponderance of advantage lies. If it could be demonstrated that any advantage results one way or the other, that would be no reason for deviation from the law.

If it were a fact that the community property system, by reason of establishing a partnership between husband and wife, resulted in a saving to the taxpayers concerned, it would be no more than the accidental saving which may result in any state having any system of law which that state may see fit to adopt regulating property titles or the property rights resulting from the marriage contract.

However, if there were any basis for the suggested unfairness, the only way to meet it would be by a Federal Revenue Act *which would make specific provision for taxing the income of husbands and wives with the same specified separation of the income of each spouse applicable in all the states.* Whether such a Federal Act would be constitutional in view of the Sixteenth Amendment and the holdings of this court in the case of *Pollock v. Farmers Loan & Trust Co.* and such subsequent cases, it is unnecessary now to determine.

But the unfairness that would result from the adoption by this Court of the construction of the Revenue Act now urged by Appellant is manifest and overwhelming.

It is to be remembered that appellant is not now urging that *the income of the wife be taxed separately* from the income of the husband, either insofar *as their several earnings are concerned* or insofar *as the earnings of their joint accumulations are concerned.* Appellant's contention is that the laws of the State of Washington be accepted up to the point of pooling the earnings and accumulations of both spouses after marriage, and then that these laws be departed from by the bold act of taxing this entire community income to the husband. In none of the so-called common law states (insofar as known) is the income of the wife added to the income of the husband and surtaxed accordingly. All of these states presumably have changed the barbarous principle of the common law by which the husband becomes the owner of his wife's earnings.

So far as known, in all of those states the wife's earn-

ings and the income arising from accumulations thereof (instead of being assessed to the husband for Federal taxation) are reported and taxed separately. As to such property accumulations as the husband transfers to his wife (to insure her a fund producing an income) such income is taxed only to the wife. In the State of Washington, by common consent, in lieu of a voluntary transfer by husband to wife, the law creates in her for her protection a one-half interest in the community property. Is this interest in the wife less entitled to recognition than a property interest transferred voluntarily by her husband in some so-called common law state?

Further, recoveries for personal injuries suffered by the wife, equally with recoveries for personal injuries suffered by the husband, are community property in Washington. Such recoveries are frequent, as life becomes more complicated and subject to risks. A substantial part of the accumulated property of husbands and wives is often the result of a personal injury to the wife. In the states having a system whereby the wife's property is recognized as being entirely separate from that of the husband, her recoveries for personal injuries are her own, and income based on accumulations thereof is taxed by Federal law to her alone.

In other words, the argument of unfairness must lead to the reverse of Appellant's contention. That contention would utilize the community property laws of Washington and six other states, to create an artificial status not based on any statute, state or federal. It would penalize husband and wife by recognizing and enforcing the community property law so far as it combines the earnings and personal injury recoveries of the wife with the earnings and personal injury recoveries of the husband, and places in one common fund the income of the wife's share along with the income of the husband's share of all marital accumulations. Having recognized the community property law so far as its operations would be adverse to husbands

and wives in Washington, Appellant's contention would then have the combined income of all the accumulations taxed and surtaxed to the husband alone. This artificial method of taxation would refuse to recognize the ownership to be where the state law puts it, namely, "in the two spouses jointly," although utilizing the state law to effect the joining of the incomes. Appellant's contention, so far from accomplishing uniformity, would make uniformity impossible as between the systems prevailing in the various states, since in all the so-called common law states, *full* effect is given to the state statutes.

Wives in Washington engage in trade and business. They are (with or without their husbands' actual cooperation) proprietors of shops, artists, teachers, clerks, physicians, lawyers, librarians and what-not. By the law of the state of their citizenship, their earnings and gains in all capacities are pooled with the earnings and gains of their husbands, and the joint result is community or common property. It would be the height of arbitrariness to treat all of this joint pool of their gains as the property of the husband, and to tax and surtax him accordingly. Such a course would not follow the law of any jurisdiction, but would *by arbitrary fiat* create, by judicial decision, a new property system.

Appellant's brief (p. 17) says:

> "If married persons in the State of Washington, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes *at lower rates* than married people in other states who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated."

The Revenue Act prevents, in express terms, any discrimination between the citizens of different states by taxing at fixed rates "the net income *of* every individual," and has adopted, from necessity, the law of each state as

defining what is the income of each individual, and looks to state law to answer the question, "To whom does the income belong?"

There is no possibility that individuals in Washington will be taxed at lower rates than those in "common law" states if the present practice of adhering to individual incomes be followed. On the other hand, as we show on p. 38 of this brief, the adoption of appellant's contention for taxing and surtaxing all of the community income to only one of the spouses (which income represents the joint earnings and accumulations of the spouses), would result in a most unjust and prejudicial raising of the rate against taxpayers in the community property states. The purpose of the revenue law will not be defeated by taking the law of each state as final in the ascertainment of the ownership of incomes. That is what both the Sixteenth Amendment and the Revenue Acts contemplate.

I.—ANSWER TO APPELLANT'S REVIEW OF WASHINGTON DECISIONS IN SUPPORT OF THE CONTENTION THAT THE COMMUNITY OF HUSBAND AND WIFE IN THE STATE OF WASHINGTON IS AN "ENTITY."

There are numerous decisions in Washington where the word "entity" has been used in connection with the community property system. In many cases in Washington and elsewhere, partnerships are often spoken of as "entities." It is a convenient term. In the marshaling of assets, and in separating joint from several liabilities, some such term is almost necessary in order to maintain a distinction between individual rights and interests and joint rights and interests.

The use of this language does not support appellant's inference that the Washington statutes have created a juristic person in the nature of a corporation or other-

wise. In Appendix A, pages 135-143, there are set forth the Washington statutes establishing the community system. These statutes do not contain the word "community" as a noun, but only as an adjective, describing the "community property" or "the common property." At pages 30-31 of this brief, we have quoted at length from the latest decision of the Supreme Court of Washington on this point, namely, *Bortle v. Osborne* (February 24, 1930, unofficially reported in 285 Pacific Reporter, p. 425). Undoubtedly, this decision has been overlooked by counsel for appellant. We submit that it disposes entirely of appellant's contention as to the nature of the "entity." This "entity" is a relation, not a person. The husband and wife, as owners of the community property, are viewed in a certain relation, which for convenience is called the "community." The same treatment is accorded to a partnership without losing sight of the fact that the individuals in the partnership own the assets and are not merged into a statutory being.

It is to be noted that, when the husband sues the wife, or vice versa, over disputes concerning community questions, each sues the other *as an individual.* It is not the so-called "entity" or community that is a party to the case, either plaintiff or defendant.

Mattinson v. Mattinson, 128 Wash. 328, is cited by appellant as holding that the wife as an individual may sue the community. A reference to the case will show that the wife as an individual sued the husband as an individual, and the rights of the community were adjusted in that suit. The only parties to the suit were the plaintiff wife and defendant husband.

As declared in *Bortle v. Osborne* (285 Pacific Reporter 425, February, 1930) the community property is owned by husband and wife, each owning an undivided one-half interest therein, with statutory provisions regulating the management and alienation of that property, real and

personal, in which both spouses take part, the powers of each being defined.

Appellant's brief, at p. 23, cites certain sections of McKay on Community Property, wherein that author lays down the rule flatly that the Supreme Court of Washington holds that the community is a juristic entity. It is evident that that author has misunderstood the use of the word "entity" as used by the Washington Supreme Court in several cases. *Bortle v. Osborne* is the latest case and holds as stated.

McKay's discussion of ownership of community property in the sections cited by appellant (Secs. 1172, 1183, 1184) arrives at no definite conclusion except that the community system is *sui generis*. Mr. McKay comes to the further conclusion in Sec. 1184:

> "Those who accept the theory that the husband is owner during marriage are obliged to admit that he is not owner of community property in the sense that he owns his separate property. The wife has rights of some sort, either in the property, which makes of her a sort of *co-owner*, or else a right to have her moiety, which creates a form of equitable right."

In Section 1186, Mr. McKay arrives at the sound conclusion that "the law, rather than any person's theory, should control." As a part of the law, and as defining its authoritative construction, of course, the decisions of the highest court of the state are controlling.

J.—ANSWER TO APPELLANT'S CONTENTION THAT IN THE STATE OF WASHINGTON (A) THE HUSBAND IS GIVEN COMPLETE AND EXCLUSIVE POWER TO DISPOSE OF COMMUNITY PERSONAL PROPERTY, TO BIND THE COMMUNITY BY CONTRACTS CONCERNING IT AND TO SUE AND BE SUED IN REGARD TO IT: (B) THAT THE HUSBAND HAS THE MANAGEMENT AND CONTROL OF THE COMMUNITY REAL ESTATE AND MAY BIND THE COMMUNITY BY CERTAIN CONTRACTS RELATING TO IT: (C) THAT THE COMMUNITY PROPERTY IS LIABLE FOR ALL DEBTS INCURRED BY THE HUSBAND AND ALL TORTS COMMITTED BY HIM IN THE PROSECUTION OF COMMUNITY AFFAIRS.

This argument has been to some extent anticipated in preceding pages.

It is, of course, conceded that, in any community property system, the husband has certain statutory powers of management and control. In Washington the wife also has certain statutory powers of management and control, especially as to real estate. The courts naturally recognize and apply these statutory provisions. It is not necessary to discuss at length the Washington cases cited under these heads in appellant's brief. None of these cases controvert the Washington cases we have cited in this brief declaring the ownership by the wife of what the statute (Sec. 1342) calls "her one-half of the community property." In fact, the decisions cited by appellant support our contention. We refer to a few of them:

Ostheller v. Spokane & Inland Empire R. R. Co., 107 Wash. 678, holds that, where a husband and wife are killed in the same accident, the recoveries for both deaths constitute community property, and the contributory negligence of the husband, as the manager of the community

personalty, is held to defeat recovery on the wife's behalf.

Mattinson v. Mattinson, 128 Wash. 328, holds that, where the husband borrows money from the wife, he and the community property are liable to the same extent as if borrowed from a third party, and the wife is authorized to bring an action against the husband to secure payment accordingly.

A number of the cases cited are to the effect that, where the husband holds, as community property, stock in a corporation, his transactions in aid of that corporation constitute community obligations.

Assignments by the husband alone of personal property and personal choses in action are held valid without the signature or assent of the wife. Of course, the proceeds of such assignments remain community property. The interest of a lessee in a lease is held to be a chattel and therefore personal property which the husband may assign with like result as to proceeds.

Torts committed by a husband while engaged in the management of community property are held to be enforcible against the community property. The contrary is held as to torts committed by the husband when not acting with respect to the community property.

Debts contracted by the husband during the marriage are *prima facie* community debts, but the contrary may be shown and the wife is entitled to her day in court on the hearing of that question.

In *re Finn's Estate,* 106 Wash. 137 (cited by appellant), the Court laid down the following rule:

> "Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is

community property, but this presumption may be rebutted by proof."

Appellant cites *Daniel v. Daniel*, 106 Wash. 659, as holding there need be no accounting of community property as between husband and wife. Generally under the Washington law there is no accounting as between husband and wife, except in the case of fraud, wrong doing, dissipation, over-reaching, or some other ground for equitable interference, in any of which cases the Court will protect the wife's interest. In *Daniel v. Daniel*, the wife was dead, and her daughter brought suit for certain property, alleging that it was community property and that, by the wife's death, the daughter succeeded to her mother's interest. There was an issue of fraud in the case as to whether *after the wife's death the daughter had been induced by fraud to release her claim to the property.* The Court treated and disposed of that fraud issue. That issue related wholly to the reported release and had nothing to do with the transactions that occurred on the part of the husband or wife during the existence of the marriage relation. There being no evidence of wrong on the husband's part during the marriage, the Court held that the daughter succeeded only to the rights of the wife who, in the case stated, had no right to an accounting during the marriage relation. This was plainly the correct holding in view of the fact there was no charge of fraud, overreaching or other ground for equitable interference as against the husband.

In *Normile v. Denison*, 109 Wash. 205, cited by appellant, the lower court had sustained a demurrer to a complaint which alleged that, at the time of making a property settlement between husband and wife, certain property was fraudulently concealed by the husband. The Supreme Court (reversing the judgment below which had dismissed the case) declared that, when a husband attempts to defraud the wife of the community property, the wife can obtain redress.

In *Barkley v. American Savings Bank,* 61 Wash. 415, cited by appellant, the Court holds that, upon the granting of a divorce without making any disposition of the community property, the spouses become tenants in common thereof (a continuation of their former title), citing in support of the holding the earlier case of *Ambrose v. Moore,* 46 Wash. 463, and other cases where the continuation of the former title of the husband and wife is recognized, the joint ownership as community property becoming, by dissolution of the community, a tenancy in common.

Appellant recognizes that the community property is not liable for the separate debts of the husband, whether contracted before or after marriage, nor for torts committed by the husband, not committed in the prosecution of community affairs.

K.—ANSWER TO APPELLANT'S STATEMENT THAT THE WIFE CANNOT, WITHOUT HER HUSBAND'S CONSENT, MAKE ANY VALID CONTRACT WITH REFERENCE TO COMMUNITY PERSONALTY OR COMMUNITY REAL ESTATE, AND CANNOT RESTRAIN HER HUSBAND IF HE MISMANAGES THE COMMUNITY PROPERTY, OR REMOVE ANY PART OF IT FROM THE HUSBAND'S CONTROL WITHOUT SECURING A DIVORCE.

(1) Under the Washington law, the husband has in general the management and control of the community personal property and certain powers of management over the community real estate, his powers in both cases being limited by statute. The plain purpose and intent of the statute is to provide a method by which dead-locks shall be avoided and the community system be carried on to the advantage of both spouses.

Whenever there is ground for interference of the courts

to protect the wife's interest, the courts of Washington have never failed to protect her.

Marston v. Rue, 92 Wash. 129 (cited by appellant) recognizes that, when the occasion arises, the wife's interest will be protected, the Court saying, "the community personal property *is as much the wife's as the husband's.*"

Appellant cites *Hynes v. Colman Dock Co.,* 108 Wash. 642, as holding that the wife may not sue for personal injuries to herself where the husband refuses to join as a party. Appellant overlooks the fact that this holding is expressly based by the Court on the ground that (p. 646) "in the instant case we find no allegation in the complaint of a wilful *abandonment* or *dissipation* or *waste* of the community personalty, nor of the husband's *failure to exercise his honest judgment* in refusing to institute the action," a plain declaration that the Court stands ready to protect the wife in case of the existence of any of these grounds.

Appellant cites *Wampler v. Beinert,* 125 Wash. 494, a case which is in fact in appellee's favor, holding that the wife's interest in the community personal property is protected by the courts where the husband neglects or refuses to act. The Court quotes from *Stewart v. Bank of Endicott,* 82 Wash. 106, as follows:

> "The purpose of Sec. 5917 is to give the management and control of the community personal property to the husband *for the purpose of facilitating the business of the community.* He can neither beggar his family nor use the community personal property to gratify a caprice to *thwart the law* or for his own personal aggrandizement."

The Court also quotes from *Olive Co. v. Meek,* 103 Wash. 467, as follows:

> "The doctrine of *respondeat superior* cannot be applied to acts of the husband, when such acts are without the scope of his authority. *Day v. Henry,* 81 Wash. 61. To hold otherwise would in effect *nullify*

> *the community property law. There is no distinction between vested rights in either community real or personal property except that the husband is made the manager of the community personal property for the community.*"

The Court also quotes from *Marston v. Rue,* 92 Wash. 129, as follows:

> "That there is *in the wife inherent power* under our law to act in a serious absence of the husband is plain."

The Court then quotes from *Dority v. Dority,* 96 Tex. 215, and *Hall v. Johns,* 17 Idaho, 224, (the quotations are given at page 42 of this brief) and approves and adopts the rule prevailing in Texas whereby wives are given ample remedies by suits against the husband, in case of violation of community rights.

The Washington court also holds in this case (*Wampler v. Beinert,* 125 Wash. 494) that, where the husband settled and released a claim for personal injuries to the wife, the release would be held void at the suit of the wife, if made in fraud of her rights or not in good faith.

In *Parker v. Parker,* 121 Wash. 24 (cited by appellant) the Court said:

> "The law which gives the husband the management and control of the community personal property does not give him the right to make substantial gifts thereof against the consent of the wife. As was said in *Schramm v. Steele,* 97 Wash. 309, 'the statute intends no more than *to make him a statutory agent of the community*'."

(2) Appellant's contention that the wife cannot restrain her husband if he mismanages the community property is not borne out by any cases cited. It is not supported by any case found in the Washington Reports.

Floding v. Denholm, 40 Wash. 463 (cited by appellant), holds that, when the husband contracts a community debt, it can be enforced against the community property, al-

though it is the result of an investment which was made against the protest of the wife. A difference of judgment, or an error of judgment, is a very different thing from bad faith or wrong doing.

Another case cited by appellant to sustain the proposition is *Bellingham Motors Corporation v. Lindberg*, 126 Wash. 684, where notes given by the husband for the purchase of an auto truck were held to be presumptively a community debt although the wife protested against the purchase.

The cases cited, therefore, do not sustain the appellant's proposition as asserted.

We have cited on pp. 40-43 also 21-32 of this brief other cases upholding the right of the wife to relief in case of wrong doing by the husband. Cases involving such a situation have been few. The Washington Court has not been often called upon to protect the wife against wrongful acts of the husband. The important fact is that *no Washington case can be found where relief to the wife was refused against the husband as to community property in the case of fraud, wrong doing, over-reaching, dissipation, or abandonment.*

Of course, the wife cannot repeal or ignore the statute which gives her husband certain powers of management. Neither can the husband repeal or ignore the statutory provisions giving the wife the right to participate in the control and management of real estate, and in certain cases in the control and management of personal property. Both spouses are bound by the statutory provisions. Case after case has been decided by the Washington Court annulling the husband's attempt to go beyond the statutory powers of management conferred on him "for the purpose of facilitating the business of the community." (Language of the Court in *Stewart v. Bank of Endicott*, 82 Wash. 106).

The fact that the wife cannot prevent the exercise of the husband's statutory powers, when exercised in good

faith, amounts to no more than the fact that the husband cannot prevent the exercise by the wife of her statutory powers. Both of these powers operating together constitute the complete power of dominion, control and enjoyment. Relief has frequently been granted by the courts against attempts to subject community property to liability when the non-community character of the liability contracted by the husband appears. When the evidence shows the liability to be the separate liability of the husband, the presumption that it has a community character is at an end. See this brief, pp. 28-30.

We submit that appellant has wholly failed in the endeavor to controvert *the fundamental proposition* laid down by this Court in *Arnett v. Reade,* 220 U. S. 311, that "*It is conceded* by the court below, *and everywhere, we believe,* that *in one way or another she* (*the wife*) *has a remedy* for an alienation made in fraud of her by her husband."

It is evident that there is no real support for the contention that the strong and emphatic provisions of the Washington system (which the Attorney General has said in 32 Op. Attys. Gen. 435 "more fully recognize" the wife's property rights than the system of any other state) are mere academic pleasantries—that the courts of Washington recognize the husband as having the rights of an owner—that those courts hold that the fruits of the wife's labor and her contributions to the common fund *belong to the husband,* and that she can have no judicial relief when her statutory rights and interests are violated. The Washington courts, as we have shown, constantly hold to the contrary.

In Appellant's statement at p. 38, that the wife "cannot interfere with his contracts or bind the community by her own contracts except as to family necessities," appellant overlooks the fact that it takes the joint contract of ***both husband and wife*** to sell, encumber or lease the community real estate and that, without the wife's contract in

this regard, such real estate must remain entirely unproductive and unsold and unencumbered except that it may be let by a mere tenancy at will. Appellant likewise overlooks the important fact that, as to both real estate and personal property, the Court stands ready to protect the wife's interest whenever the husband attempts to convert any community property to his separate use or enjoyment, or otherwise transcends the statutory powers which both the Washington Court and this Court (in *Warburton v. White,* 176 U. S. 484) hold are vested in him only to facilitate and carry on the business of the community.

Appellant's brief, at pp. 37-38, refers to the fact that, under the divorce law of Washington, the Court in pronouncing a divorce disposes of both the separate property of the spouses and of the community property. It is hard to see how this leads to appellant's inference concerning the ownership of community property. The separate property of the wife, the separate property of the husband, and their community property are *all* made subject to the equitable disposition of the Court. The equitable disposition of all the property depends upon the question of the fault or grievance leading up to the divorce, and the other circumstances. No Washington case is cited, and we are sure none can be cited which, in dividing *all* the property of both spouses, has ever said or intimated that the spouses are not equal owners of the community property. *Ambrose v. Moore,* 46 Wash. 463, is to the contrary.

It should be further observed that in contracts for conveying, leasing or otherwise encumbering or disposing of community real property, both spouses stand exactly on an equal footing.

The many cases that we have cited show clearly that the Washington Court has constantly obeyed the mandate of the community property statute, Rem. Code Sec. 6898, directing that the provisions of the community property law and all proceedings under it "shall be liberally

construed with a view to effect its object." These cases are all overlooked by Appellant in the statement (Brief p. 32) to the effect that the Washington Court "has shown no disposition to construe these provisions liberally in order to give the wife positive powers of control."

In the case of the Seaborn income now under consideration, $7,000.92 profit on the sale of real estate known as "Lake Washington Shorelands" (R. 27) was necessarily the result of a contract of sale in which the wife was as much a principal as the husband. How much of the Seaborns' accumulated property had accrued from transactions as to realty and personalty in which the wife took part as principal and active participant does not appear. No effort has been made to trace the origin of that accumulated property, it being taken for granted that its status is sufficiently established by the court finding that it was accumulated by Seaborn and his wife after marriage and is their community property (R. 20—Par. G).

L.—ANSWER TO APPELLANT'S FURTHER CONTENTIONS REGARDING ALLEGED "COMMAND" OR "DOMINION" OVER THE COMMUNITY PROPERTY IN WASHINGTON AND THE CLAIMED INTERPRETATION OF THE REVENUE ACTS APPLICABLE THERETO.

In appellant's brief (p. 36) it is attempted to boil down the community property system of Washington to the simple statement that "The only important restriction on his powers is that he cannot give away a substantial amount of community property or fraudulently sequester

it." In fact, the important point in the Washington system is that the husband cannot make community property his own in any manner whatever. He not only cannot fraudulently sequester it, but he cannot sequester it at all, in the sense of depriving the wife of her one-half interest therein. Whatever he does with the community property under his statutory powers, the resulting proceeds of his disposition are community property. Aside from the fact that, as to real estate his powers are practically impotent without the wife's joinder, the husband can do nothing with either class of property to despoil the wife of her interest. The Washington statutes were not copied from those of California, but, on the contrary, have gone further than the laws of any other community property state in recognizing the full and equal interest of the wife (32 Op. Attys. Gen. 435).

The laws of Washington give statutory and judicial recognition of the fact that the wife, in modern life, produces the accumulations of the spouses fully as much as the husband, and is, in fact the equal acquirer of the community property. The result that these laws contemplate is not a technicality, but a beneficial vested ownership. The limitations on the practical rights of the husband are such that, under no definition, can the husband be considered the sole owner of the community property. When one can neither use property for his own benefit, nor use it for the payment of his debts, nor allow his creditors to levy upon it, nor will it away, he is not the sole owner.

There can be no foundation for the idea that the husband in the State of Washington, has "dominion" or "command" over the community property. Neither the word "dominion" nor the word "command" occurs in the Washington statutes. We have not been able to find either word in any Washington decision used with reference to the husband's limited powers of control and management. To apply either word to the husband's

powers in Washington is to legislate directly against the Washington statutes and decisions.

As we have shown, appellant's contention that the relationship existing between husband and wife under the laws of Washington results in the creation of a juristic being, is directly denied by the decisions of the Washington Supreme Court in *Bortle v. Osborne,* 285 Pac. 425 (February, 1930), and the title, ownership and right of enjoyment are by this and other decisions held to be equal in both spouses. The Washington cases cited by appellant, holding that the husband can dispose of personal property and of chattels real (such as leases, contracts, and the like, which are held to be personal property) in the prosecution of the affairs of the community, without consent of the wife, must be read with the recollection that the proceeds of all of such transactions remain community property.

Appellant's statement, that no decision can be found which holds that the wife may force the husband to give her a share in the community property, if true, would be of no more consequence than the fact that the husband cannot force the wife to give up to him her one-half or any other share of the community property. He may exercise (in the case of real estate and in other instances jointly with the wife) certain powers. Further, the wife may, in fact, without seeking divorce, compel the husband to give her a share of the community property.

Kimble v. Kimble, 17 Wash. 75;

State ex rel. Lloyd v. Superior Court, 55 Wash. 347.

See other cases cited on pp. 22-32 of this brief.

The Circuit Court of Appeals, of the Ninth Circuit, which has had occasion to become thoroughly familiar with the Washington statutes and decisions, said in its certificate in this case (Cert. 2):

"It is the established rule of decision in the highest court of the State of Washington that the wife,

> during the life of the husband, as well as upon a dissolution of the marriage, has a vested and definite interest and title in the community property, real and personal, equal in all respects to the interest and title of the husband therein. *Rucker v. Blair,* 32 Fed. (2d) 222. It is likewise the established rule of decision in that state that the power given to the husband of management and control of the community personal property, is a naked power in trust for the community. It is not a power coupled with an interest, and gives the husband no proprietary right or interest in the one-half of the community property, real or personal, which belongs to the wife. It differs in no respect from an agency created by a general power of attorney or other contract of agency."

Appellant attempts to avoid this highly authoritative digest of the Washington community property system by saying that, under the general law of agency, the principal may revoke the agency. It can hardly be doubted, however, that a statute may create the same kind of agency which the parties might create by contract, and make the agency irrevocable within the statutory limitations.

Appellant says that the husband does not act "as agent for the wife." The community being not a new juristic being, but being only a relationship between the two spouses who jointly own the property, the husband (and in certain cases of real estate and the like, the wife also) is the statutory agent for managing the property owned jointly by the parties whose powers of alienation, encumbrance and the like are restricted to the statutory method.

At pp. 29 and 30 of appellant's brief, it is argued that it is proper to treat the community property as the property of the husband alone, because every debt which is incurred by him in the prosecution of community affairs, and every tort which is committed by him when so engaged, constitutes, a liability of the community. It is a well recognized principle of common law, and of the law

generally, that every debt contracted by any manager of property in the prosecution of the business under his management, and every tort which is committed by a manager when so engaged, constitutes a liability of the business and property of which he is manager. We know of no authority which has ever held that, because of this liability of the property or of the principal for the acts and torts of a manager, *the manager becomes the owner of the property which he manages.* The same observation applies to appellant's comment (Brief, p. 41) that, as the community profits by the husband's good judgment, it "must bear the loss of his mistakes," a principle common to all managements.

We submit that there is no intelligible ground for interpreting the clauses of the Revenue Act now under consideration as imposing an excise upon certain powers of management or control, even though these powers could be exaggerated into "dominion" or "command." Appellant cites, in this connection, *Chase National Bank v. United States*, 278 U. S. 327, and *Reinecke v. Northern Trust Co.*, 278 U. S. 339. Both of these cases involved the federal estate tax, which is distinctly an excise levied under the original taxing power conferred by the federal constitution, and has no reference to the income tax authorized by the Sixteenth Amendment. *Knowlton v. Moore*, 178 U. S. 41.

If Congress can constitutionally tax by excise the power of management and control vested in the husband, with respect to community property, it has never attempted to do so, certainly not in the Revenue Act of 1926. The propriety of the federal excise estate tax, levied on the passing of control, by the death of the person having the power of control, is undoubted, but, for obvious reasons, the question now before the Court is of an entirely different nature.

Bromley v. McCaughn, 280 U. S. 124.

"Management" and "control," the descriptive words

used in community statutes to indicate a certain limited power and authority of the husband over the property, do not confer entire ownership or title upon the donee of such powers. In fact, those words most distinctly deny full ownership or title, because if the title were already vested in such donee alone it would be unnecessary to confer upon him powers of management and control. The words are apt for describing a managing partner which the Washington Court says the husband is, calling him "only the head of a firm."

Marston v. Rue, 92 Wash. 129, 131.

"Managing partners," "managers of corporations," and "Corporate Board of Directors" having control of the corporation's affairs, are common and well-known things. No one thinks of confusing any of these functions with ownership. Both to lawyers and laymen, the distinction is too plain for discussion.

The word "dominion" is not found in the Washington statutes, and, so far as we know, it does not appear in any Washington decision. In certain classes of cases, in excises for instance, the word or some equivalent may be found useful. So also, where an owner has made a conditional or defeasible transfer of his title, permitting him to *retake the title* at pleasure (*Corliss v. Bowers,* 281 U. S. 376).

In the present discussion of community property questions, the word "dominion" seems to be seized upon by appellant as some sort of a "bridge" to slide over from "management" or "control" to "ownership." The word "dominion" is too vague in its meaning to furnish any kind of test in deciding the present case. "Dominion" may be a criterion of taxability under some excise statutes, where something less than ownership may be the thing excised. It cannot be properly used to create a doubt as to the meaning of "the net income *of* every individual." The ambiguity of the word, or its Latin original, is men-

tioned by this Court in *Arnett v. Reade,* 220 U. S. 311, 319. By all argumentation rules, a definition should be clearer than the thing defined. So vague a word as "dominion" needs definition more than the words of the Act.

If Congress had intended the words "the net income *of* every individual" to mean "ownership" in some states, "management" in another, "control" in another, and "dominion" in still another, it is certain that Congress would have used some apt words to indicate that intention. The only words used, on the contrary, are those of ownership, which ownership must be determined by the only authority which can determine ownership, namely, the state law.

In appellant's brief (p. 11), it is said:

> "Indeed, the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control, and not in any narrow, technical sense, implying formal, legal, or equitable ownership."

The word "owner" is a word in most common use, not only by courts and lawyers, but by everyone. Its meaning is well known. It is probably used in conversation a hundred times where the word "dominion" is used once. When an owner employs a manager or puts a person or a Board in control of his property, he well knows that he is not parting with ownership, and that his ownership is not affected in the least. If the word "dominion" be used in any such connection, the judge, the lawyer or the layman will ask for further particulars. He will say the word is too vague to give him information. And when property or income is spoken of as the property or income "*of*" an individual, no one thinks of the manager as the owner, though he have "control" of it.

M.—ANSWER TO APPELLANT'S CONTENTION WITH REFERENCE TO PRACTICAL DIFFICULTIES IN THE COLLECTION OF THE TAX IF THE INCOME IS DIVIDED BETWEEN HUSBAND AND WIFE.

As stated by the Circuit Court of Appeals, at p. 2 of its certificate:

> "Ever since the year 1920, husbands and wives domiciled in the State of Washington have made separate returns of their community income, each reporting one-half thereof, and taxes have at all times been paid on such returns. This practice has at all times been fully recognized and sanctioned by the opinions of the Attorney General of the United States and by the rulings of the Secretary of the Treasury and other taxing officers of the Government."

No difficulty whatever has arisen in connection with this practical administration of the Act. Appellant's fears in this regard are answered by the historical fact. Further, this fear overlooks the clearly defined boundary line between state and federal jurisdictions. The state alone can define the ownership of property. The federal government alone can levy federal taxes, determine all questions of their incidence, of their lien, and of their collection.

A state statute or a decision which would attempt to say that the community property or any part thereof shall not be liable for a federal tax imposed on the income thereof by the federal government, would be null and void. The state has nothing to do with that question. If appellant were right in the suggested fear, there would be as much difficulty in collecting the income tax under appellant's contention as under that of appellee, since the separate debts of the husband are not collectible out of the community property any more than are the separate debts of the wife.

The tax obligations arising from the federal income tax law are not debts. They do not arise from contract or

tort. They are statutory imposts levied by competent authority, and arise wholly from the statutes levying them.

Appellant's argument under this head proceeds in a vicious circle. Of course, if the wife is assumed not to be the owner of income that is taxed, she can assert no rights as a taxpayer. It is obvious that if the wife is owner of a half interest in the community property and income, having an interest therein equal to that of her husband (as the Washington Courts constantly hold), she is one of the persons taxed by the revenue acts and is subject to all of the obligations and is entitled to all of the remedies relating to any other taxpayer. There is not and could not be any discrimination against a wife in that regard, as Appellant's brief intimates, and all remedies available to the United States are as available against a wife as against a husband.

No difficulty of the kind suggested by Appellant has ever been encountered in the ten years of actual practical experience. An argument is of no validity against a demonstrated fact. As we show elsewhere, the common-law and statutory partnerships existing in so-called "common law" states are constantly recognized by the Treasury Department and the Internal Revenue Bureau. The wife, not the husband, is taxed for her share of the income of such partnerships. The principle is of general application.

N. ANSWER TO APPELLANT'S CONTENTION REGARDING THE PURPOSE OF CONGRESS TO CREATE A NATIONAL SYSTEM.

Appellant's brief, at pp. 16-17, says that the purpose of the Revenue Acts is "to create a national system for the taxation of incomes without discrimination between taxpayers in the several states."

That national system is evidenced by the language of the Revenue Act taxing "the net income *of* every indi-

vidual." Undoubtedly, it implies uniformity and equality in administration. But appellant's implication that that uniformity and equality are to be achieved by assuming some "national" theory of property titles and some "national" theory of the proprietary rights of married persons, would be the gravest error. Property titles and the proprietary rights of married persons remain as absolutely within the individual powers of the several states as if the income tax law had not been enacted.

The revenue acts take as they find them the property rights of individuals, such matters being beyond the control of Congress. Congress, taking into consideration and recognizing the different property systems existing in the various states, enacts revenue laws which impose an equal rate of taxation upon the net income *of* each individual, as that income is defined by state laws. Any uniformity or equality sought to be accomplished *by over-riding state laws* would be destructive of the constitutional system of government. Undoubtedly, as to excises, the federal law, as this Court has frequently held, can place an excise upon anything or the doing of any act or the exercise of any single right relating to property. Such excise tax, however, would have to define the thing or act excised, and define it in a way so that the law *could be applied to the same thing or act in every state.*

So far as concerns the tax under consideration in this case, it does not purport to be an excise upon the exercise of management or control, and does not purport to tax anything but the net income *of* every individual.

FURTHER ANSWER TO APPELLANT'S CONTENTION AS TO OWNERSHIP OF COMMUNITY PROPERTY BY THE HUSBAND.

Appellant's contention that the husband alone, and not the husband and wife jointly, is the owner of com-

munity property and income in the State of Washington, is opposed—

(1) To the language of the Washington statutes.

(2) To the holdings of the Washington Supreme Court as is shown by all the leading cases cited.

(3) To the holdings of this Court in *Warburton v. White,* 176 U. S. 484, *Buchser v. Buchser,* 231 U. S. 157, and *Arnett v. Reade,* 220 U. S. 311.

(4) To the authoritative interpretation of the Washington statutes and decisions made by the Circuit Court of Appeals of the Ninth Circuit, as shown by its certificate in this case.

(5) To the opinion of the Attorney General given in February, 1921 (32 Op. Attys. Gen. 435) and several later opinions.

(6) To the departmental regulations and rules, and nearly ten years of established practice.

(7) To the demonstrated intent of Congress in its refusal to change the language of the Revenue Acts so as to tax community income to the husband alone.

The important question here is not who must pay the tax on community income, but what amount of tax must be paid thereon. In any event, a tax will be paid on the community income. The Revenue Act, however, does not contemplate that the income tax shall be increased in any state by taxing and surtaxing to one spouse alone the entire community income when, by long established state law, that income belongs to the two spouses jointly.

The Washington community property law means *precisely the same now as when it was enacted,* long before the adoption of the Sixteenth Amendment. *Neither that amendment nor the Revenue Act has affected its meaning.* It is still the expression of the will of a sovereign state concerning a subject wholly within its powers.

PARTNERSHIPS BETWEEN HUSBAND AND WIFE, LAWFUL UNDER THE LAWS OF ANY STATE, ARE SPECIFICALLY RECOGNIZED BY THE RULINGS OF THE TREASURY DEPARTMENT. IN ALL SO-CALLED "COMMON LAW" STATES, INCOMES OF PARTNERSHIPS CONSISTING OF HUSBAND AND WIFE ARE DIVIDED BETWEEN THEM AND EACH PAYS THE FEDERAL INCOME TAX ON HIS OR HER INDIVIDUAL SHARE. THE FACT THAT THE HUSBAND IS MANAGING PARTNER OR CONTROLS THE PARTNERSHIP IS NOT TREATED AS MATERIAL.

The General Counsel of Internal Revenue, in his G. C. M. 3421 (C. B. VII-1, January-June, 1928, p. 106) holds that, where the local law permits husband and wife to be partners, and such partnership in fact exists, the share of the partnership profits accruing to the spouses jointly is to be divided between them so that the wife is taxed for one-half of the profits accruing to the husband and wife.

A similar ruling was made by A. W. Gregg, Solicitor of Internal Revenue in S. M. 5411 (C. B. V-1, January-June, 1926, p. 271).

To the same effect are the following authorities:

Appeal of Bellingrath, 3 U. S. B. Tax Appeals, 11;

Sunlin v. Commissioner, 6 U. S. B. Tax Appeals, 1232;

Kahn v. Commissioner, 14 U. S. B. Tax Appeals, 125;

Phelps v. Commissioner, 13 U. S. B. Tax Appeals, 1248.

In the case last cited, the opinion states:

"Nor do we think that it is material that the apparent object of the reorganization of the partnership in 1919 was for the purpose of reducing surtaxes payable by the petitioners. Clearly taxpayers have the right to change their form of organization

and their methods of doing business in any way they may see fit so long as they keep within the law."

It would result in great discrimination against husbands and wives in Washington to hold that the quasi-partnership resulting from their marriage contract, with the rights of each spouse carefully defined by law, is not to be given recognition in the division of income, while voluntary partnerships, formed by husbands and wives in other states by mere contracts *made for the express purpose* of reducing surtaxes, are honored and recognized and made the basis for division of income between husband and wife. Such holding would be a reversal of the rule laid down by this Court in *Lucas v. Earl,* 281 U. S. 111.

In Washington, the husband is *by law* "only the head of a firm" (*Marston v. Rue,* 92 Wash. 129) and the community property "is just as much hers as his," and "her property right in it is as great as his."

In Washington, a husband and wife cannot become partners in any partnership other than the statutory quasi-partnership of the community system.

Board of Trade v. Hayden, 4 Wash. 263.

ARGUMENT POINT IX. There is a clear line of demarcation in respect to income taxes, between the state and federal powers. It is of vital importance that the powers of each sovereignty be upheld.

> "In America, the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."
>
> Chief Justice Marshall, in *M'Culloch v. Maryland*, 4 Wheat. 316, 410.

The proposition is generally recognized by all thoughtful persons in public life that the preservation of the Federal Union, paradoxical as it may seem, depends now and henceforth upon the preservation, unimpaired, of the sovereign powers of the states. This thought was most eloquently emphasized in the address of the Chief Justice of this Court, in welcoming foreign jurists and lawyers at the recent meeting of the American Bar Association at Chicago. It has also been emphasized by many other men in public life for many years.

> Address, Am. Bar Ass'n. Journal, Oct. 1930, pp. 627-8.

Every additional Constitutional Amendment, conferring powers upon the Federal Government, involves the invitation to the several departments of the Federal Government—executive, legislative and judicial—to encroach upon the necessary sovereign powers of the states. On the occasion of the adoption of the Fourteenth Amendment, this danger boldly threatened, but this Court happily put an end to that serious danger in the *Slaughter-house Cases*, 16 Wall. 36, giving to that amendment a limited construction consistent with the preservation of the rights of the states. The Court refused to hold that, by the amendment (in the clause forbidding the states to

abridge the privileges or immunities of citizens of the United States), the states had been deprived of "the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character," and the Court, speaking by Mr. Justice Miller, concluded its opinion in the following historic words, which will never fade in importance, and which are appropriate to the consideration of the question now pending:

> "But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its function required, has always held, with a steady and an even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts."

As to ownership of property, all proprietary questions, the marriage status and its effects on property rights, these powers inhere in the states alone. They must be upheld in full vigor. None of those powers was taken away or weakened to any extent whatever by the Sixteenth Amendment.

That Amendment had in view the varying provisions of the diverse property systems in the forty-eight states, and contemplated its application to the community system of Washington (and equally to the particular property system of every other state) *without prejudicing the rules of property in any state* by reason of the fact that some other state or states maintain (as they have the right to do) other systems with the aim of doing justice between husband and wife.

APPENDICES

There are added to this brief Appendix A and Appendix B. Appendix A contains the statutes of the State of Washington involved in this case. Appendix B is a chronological table setting forth what we conceive to be the principal historical facts through which the question now before the Court has developed. We believe this will be helpful to the Court.

CONCLUSION

Though this cause originally came before the Court on certificate from the United States Circuit Court of Appeals for the Ninth Circuit, this court later granted *certiorari* and the entire record and cause are now before this Court for its final disposition.

For the several reasons hereinbefore stated, the judgment of the District Court herein should be affirmed.

Respectfully submitted,

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APPENDIX A

WASHINGTON STATUTES

TAKEN FROM 2 REMINGTON'S COMPILED STATUTES OF WASHINGTON, 1922

Sec. 6890 (5915) *Separate Property of Husband.* Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried (Cd. '81, Sec. 2408).

Sec. 6891 (5916) *Separate Property of Wife.* The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him (Cd. '81, Sec. 2400).

Sec. 6892 (5917) *Community property Defined—Husband's Control of Personalty.* Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof (Cd. '81, Sec. 2409).

NOTE: Notwithstanding the generality of the lan-

guage of this section the wife is the legal owner of community personal property as much as the husband, and has the same proprietary interest therein. The language of this section means no more than to make the husband the statutory agent of the community and this agency can only be lawfully exercised for the benefit of the community.

Schramm v. Steele, 97 Wash. 309;

Marston v. Rue, 92 Wash. 129;

Olive Co. v. Meek, 103 Wash. 467;

Stewart v. Bank of Endicott, 82 Wash. 106;

Bortle v. Osborne (A case decided by Supreme Court of Washington Feb. 24, 1930, not yet officially reported. The decision may be found in 285 Pacific Reporter, page 425).

(As to devise by will see Sec. 1342, *infra*).

Sec. 6893 (5918) *Community Realty, Conveyance of, etc.* The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon (Cd. '81, Sec. 2410).

(Note to Sec. 6893).

A lease is an encumbrance under this section, and a lease or an agreement for a lease executed by the husband alone is void, even though the wife had knowledge thereof.

Spreitzer v. Miller, 98 Wash. 601;

Kaufman v. Perkins, 114 Wash. 40;
Hoover v. Chambers, 3 Wash. Ter. 26.

Conveyances and agreements for conveyances made by the husband alone are void even as against the husband.

Holyoke v. Jackson, 3 Wash. Ter. 235;
Hill v. Young, 7 Wash. 33;
Mabie v. Whittaker, 10 Wash. 656;
Warburton v. White, 176 U. S. 484;
Adams v. Black, 6 Wash. 528;
Kaufman v. Perkins, 114 Wash. 40.

In suit by a vendee to reform for mutual mistake a written contract for the conveyance of land signed by both husband and wife, reformation is refused unless it be shown that the wife as well as the husband personally participated in the mistake.

Itkin v. Jeffery, 126 Wash. 47.

Sec. 6894 (5919) *Agreements as to Status of.* Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner; Provided, however, that such agreement shall not derogate from the rights of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party (Cd. '81, Sec. 2416).

Sec. 6895 (5920) *Separate Earnings of Wife, etc.* A wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and defend all actions at law for the preservation and protection of her rights and property as if unmarried (Cd. '81, Sec. 2404).

NOTE: This and the next following section must be construed together. So construed the wife's earnings become her separate property only in case of earnings made while she is living separate from her husband.

Abbott v. Wetherby, 6 Wash. 507, 512;
Marsh v. Fisher, 69 Wash. 570.

Sec. 6896 (5921) *Earnings of Wife and Minor Children.* The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife (Cd. '81, Sec. 2413).

Sec. 7598 (6564) *Married Man—Consent of Wife Necessary.* No assignment of, or order for, wages to be earned in the future shall be valid, when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto (L. '09, p. 52, Sec. 2).

Sec. 6897 (5922) *Tenancy in Dower and by Curtesy Abolished.* No estate is allowed the husband as tenant by curtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband (Cd. '81, Sec. 2414).

Sec. 6898 (5923) *Liberal Construction.* The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of the state respecting the subject to which it relates, and its provisions and all proceed-

ings under it shall be liberally construed with a view to effect its object (Cd. '81, Sec. 2417).

Sec. 6900 (5925) *Married Persons May Acquire and Hold Property, How.* Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued as if he or she were unmarried (Cd. '81, Sec. 2396).

Sec. 6901 (5926) *Civil Disabilities of Wife Abolished.* All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurption of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has: Provided, always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office except as otherwise provided by law (L. '79, p. 151, Sec. 1; Cd. '81, Sec. 2398).

Sec. 6902 (5927) *Contracts and Liabilities of Wife.* Contracts may be made by wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried (Cd. '81, Sec. 2406).

Sec. 6903 (5928) *May Sue Each Other.* Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried (Cd. '81, Sec. 2401).

Sec. 6904 (5929) *Injuries Committed by Married Woman, Liability For.* For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor,

except in case where he would be jointly responsible with her if the marriage did not exist (Cd. '81, Sec. 2402).

Sec. 6906 (5931) *Family Expenses, Liability For.* The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them and in relation thereto they may be sued jointly and separately (Cd. '81, Sec. 2407).

Sec. 10572 (8766) *Conveyances Between Husband and Wife.* A husband may give, grant, sell, or convey directly to his wife, and a wife may give, grant, sell, or convey directly to her husband *his or her community right, title, interest, or estate in all or any portion of their community real property.* And every deed made from husband to wife, or from wife to husband, shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property. The grantor in all such deeds, or the party releasing such community interest or estate, shall sign, seal, execute and acknowledge the deed as a single person, without the joinder therein of the married party therein named as grantee; Provided, however, that the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift, or conveyance: And provided further, that any deeds of gift conveyances or releases of community estate by or between husband and wife heretofore made, but in which the husband and wife have not joined as grantors, said deeds, where made in good faith and without intent to hinder, delay, or defraud creditors, shall be and the same are hereby fully legalized as valid and binding (L. '88, p. 52, Sec. 1).

Sec. 10575 (8769) *Power of Attorney to Convey Community Property.* A husband may make and execute a letter of attorney to the wife, or the wife may make and execute a letter of attorney to the husband, *authorizing the sale or other disposition of his or her community interest*

or estate in the community property, and as such attorney in fact to sign the name of such husband or wife to any deed, conveyance, mortgage, lease, or other encumbrance, or to any instrument necessary to be executed by which the property conveyed or transferred shall be released from any claim as community property. And either said husband or said wife may make and execute a letter of attorney to any third person to join with the other in the conveyance of any interest either in separate real estate of either, *or in the community estate held by such husband or wife in any real property.* And both husband and wife owning community property may jointly execute a power of attorney to a third person authorizing the sale, encumbrance, or other disposition of community real property, and so execute the necessary conveyance or transfer of said real estate (L. '88, p. 53, Sec. 4).

Sec. 10577 (8771) *Bona Fide Purchaser Protected by Record Title, When.* Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same *to an actual bona fide purchaser,* a deed of such real estate from the person holding such legal record title *to such actual bona fide purchaser* shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated (L. '91, p. 368, Sec. 1).

Sec. 10578 (8772) *Claim in Community Realty to Be Filed, When. A husband or wife having an interest in real estate, by virtue of the marriage relation,* the legal title *of record* to which real estate is or shall be held by the other, my protect *such interest* from sale or disposition by the husband or wife, as the case may be, in whose name the legal title is held, by causing to be filed and recorded in the auditor's offce of the county in which such real estate

is situated, an instrument in writing setting forth that the person filing such instrument is the husband or wife, as the case may be, of the person holding the legal title to the real estate in question, describing such real estate *and the claimant's interest therein;* and when thus presented for record such instrument shall be filed and recorded by the auditor of the county in which such real estate is situated, in the same manner and with like effect as regards notice to all the world, as deeds of real estate are filed and recorded. And if either husband or wife fails to cause such an instrument to be filed in the auditor's office in the county in which real estate is situated the legal title to which is held by the other, within a period of ninety days from the date when such legal title has been made a matter of record, *any actual bona fide purchaser* of such real estate from the person in whose name the legal title stands of record, receiving a deed of such real estate from the person thus holding the legal title, shall be deemed and held to have received the full legal and equitable title to such real estate free and clear of all claim of the other spouse (L. '91, p. 368, Sec. 2).

Sec. 10579 (8773) *Community Claim—Cloud upon Title—Removal of.* The instrument in writing provided for in the last preceding sections shall be deemed to be a cloud upon the title of said real estate, and may be removed by the release of the party filing the same, or by any court having jurisdiction in the county where said real estate is situated, whenever it shall appear to said court that the real estate described in said instrument is the separate property of the person in whose name the title to the said real estate, or any part thereof, appears to be vested, from the conveyances on record in the office of the auditor of the county where said real estate is situated (L. '91, p. 369, Sec. 3).

Note to Secs. 10577, 10578, 10579.

In *Dane v. Daniel* (1900) 23 Wash. 379, it is held

that the failure of the wife to file, in the County Auditor's office, the notice of her community interest permitted by these sections is immaterial, except as against *actual bona fide purchasers,* and that no purchaser can claim to be bona fide unless he shows that he not only did not know of the existence of the marriage but *could not have learned of the marriage by the exercise of reasonable diligence.* In practice few filings are made by wives under these sections, as they rely upon the notoriety of their marriage under the rule of *Dane v. Daniel.*

Sec. 1342. *Descent of Community Property.* Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife *of his or her half of the community property,* it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration (Cd. '81, Secs. 3303, 2411, 2412).

APPENDIX B

CHRONOLOGICAL TABLE

1. December 2, 1869, Legislature of Washington Territory enacts law adopting the community property system for that Territory. During next ten years several material amendments are made. Ever since 1879 all the essential provisions of its present community property system have been the law in the Territory and State of Washington.

2. May 20, 1895, final decision in *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, holding that under the Constitution an income tax is a direct tax, that a tax on the income of real or personal property is a direct tax on the property producing such income, and as a consequence Congress could not, as the Constitution then read, impose such tax unless apportioned among the states.

3. February 25, 1913, the 16th Amendment takes effect, empowering Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," but making no change in the nature of an income tax as a direct tax on the property producing the income, and leaving wholly unimpaired (otherwise than as affected by the 14th Amendment) the constitutional right of each state to determine all property questions, primary and derivative, and all questions of marriage and the property rights incident thereto.

4. October 3, 1913, enactment of first Income Tax Law under 16th Amendment, 38 St. L. 114, part of general Tariff Act. Sec. II A (1) at page 166, levies a tax upon net income arising or accruing "to *every citizen* of the United States, whether residing at home or abroad, and to *every person* residing in the United States." There is

also a surtax in similar language. Sec. II C provides certain exemptions for "each of said persons," the amount being greater if such person is married and living with a husband or wife. Sec. II D (proviso) enacts "that any persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid."

5. December 14, 1914, Treasury Decision 2090 and January 30, 1915, Treasury Decision 2137, without any special reference to community property, promulgate rule that under the then Revenue Act "The income of husband and wife should not be combined in a return of income for the purpose of assessing the additional or surtax," and that "the additional or surtax imposed by the Act will be computed on the basis of the income of each individual." These decisions have never been modified.

6. September 8, 1916, enactment of second Income Tax Law, 39 St. L. 756. Title I, Part I, Sec. 1 (a), levies tax upon "net income received in the preceding calendar year from all sources by *every individual,* a citizen or resident of the United Sttaes." There is also a surtax in similar language. Sec. 7 (a) provides certain exemptions for "each of said persons," the amount being greater if such person is married and living with a husband or wife. Sec. 8 (e) enacts that "persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of the partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid under the provisions of this title."

7. October 3, 1917, enactment of war Revenue Act of 1917, 40 St. L. 300. Title I, Sec. 1 makes no change in

normal tax but enacts that in addition to the normal tax imposed by subdivision (a) of Section 1 of the 1916 Act there shall be levied and paid "a like normal tax of two per centum upon the income of *every individual,* a citizen or resident of the United States." Sec. 3 declares that surtax shall be levied and paid upon same basis as in original Act.

8. February 24, 1919, enactment of Revenue Act of 1918, 40 St. L. 1057. Title II, Part II, Sec. 210, at page 1062, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "a husband and wife living together shall receive but one personal exemption of $2,000 against their aggregate net income; and in case they make separate returns, the personal exemption of $2,000 may be taken by either or divided between them." Sec. 218 (a) enacts "that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership." Sec. 223 enacts that "If a husband and wife living together have an aggregate net income of $2,000 or over, each shall make such a return unless the income of each is included in a single joint return."

9. April ...., 1920, Commissioner's Office Decision No. 426, 2 C. B. 198, gives specific recognition to the community property laws of Texas and Washington, and authorizes returns dividing income between husband and wife as to income from accumulated community property, real and personal.

10. August 24, 1920, (sometimes cited as dated September 10, 1920) Attorney General Palmer, complying with request of Treasury, renders opinion on rights of Texas husbands and wives respecting community incomes. 32

Ops. Atty. Gen. 298. Attorney General advises that husbands and wives in Texas, in rendering separate income tax returns, may each report as gross income one-half of the total community earnings, and that the same is true as to income derived from community real and personal property already owned.

11. August 24, 1920, this opinion of Attorney General is promulgated as Treasury Decision 3071, 3 C. B. 221.

12. ————————, 1920, Secretary of Treasury requests further opinion of Attorney General declaring to what states other than Texas the foregoing ruling as to community property applies.

13. February 26, 1921, second opinion of Attorney General Palmer, 32 Ops. Atty. Gen. 435. Attorney General answers questions submitted as follows:

> "(1) That in Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income one-half of the income which under the laws of the respective states becomes, simultaneously with its receipt, community property.
>
> "(2) In the states mentioned, in answer to question one, there should be included in gross estate, in computing the estate tax of the deceased spouse, one-half only of the community property of husband and wife domiciled therein.
>
> "(3) Neither of the above answers is based upon a statute [of the state] enacted subsequent to March 1, 1913."

In this opinion, referring to the State of Washington, the Attorney General says:

> "It appears to be the settled law of that state that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in the community property, equal in

all respects to the interest and title of her husband therein. Leading cases are: *Holyoke v. Jackson,* 3 Wash. Ter. 235; *Mabie v. Whittaker,* 10 Wash. 656, 39 Pac. 172; *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111; *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634; *Huyvaerts v. Roedtz,* 105 Wash. 657, 178 Pac. 801."

This opinion also includes the following summary:

"Summarizing, it appears that in all of the community property states except California, their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. Her rights in the property of the community are perhaps more fully recognized in the state of Washington, where both spouses have testamentary disposition over one-half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington, he may not sell, convey or encumber real estate unless the wife join with him in the conveyance; and as was held ni *Huyvaerts v. Roedtz, ante,* and *Schramm v. Steele, ante,* the separate debt of the husband cannot be satisfied out of community property where it is not incurred in connection with community business, nor for the benefit of the community."

14. March 3, 1921, Secretary of the Treasury approves and promulgates foregoing opinion by Treasury Decision 3138. See Internal Revenue Bulletin No. 4, for June, 1921, page 238.

This decision became the basis for Art. 31, of Treasury Regulation 62, under the 1921 Revenue Act, as follows:

"A husband and wife domiciled in Texas, Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada, in rendering separate income tax returns, may each report as gross income one-half of the in-

come which, under the laws of the respective states, becomes, simultaneously with its receipt, community property."

15. April ...., 1921, Revenue Act of 1921 as introduced in House of Representatives, as reported by Ways and Means Committee and as passed by the House contains following clause:

"Income received by any community shall be included in the gross income of the spouse having management and control of the community property."

16. November 23, 1921, Revenue Act of 1921 as reported by Finance Committee of Senate substituted for the above quoted clause in the House Bill the following:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

Report of Senate Finance Committee states at page 14 as follows:

"Under an opinion of the Attorney General, residents of the states having a community property law enjoy marked advantage over residents of other states. Income which in other states is taxed as a unit to the husband, is divided between husband and wife in states having community property laws, and surtaxes are correspondingly reduced. An amendment is added to this section designed to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

For the debate and action in the Senate see Vol. 61 Cong. Rec., No. 140, for October 27, 1921, page 6872 *et seq.* and same Volume No. 146, for November 3, 1921, page 7229.

The proposals made by Committees of both House and Senate for the insertion of language which would change the construction adopted by the Attorney General embodied in the Treasury Regulations, concerning community incomes *were refused approval by Congress.* Neither the proposed provision nor any other provision for changing the existing practice as to community incomes *was given any recognition* in the Revenue Act of 1921, with the result that the Revenue Act of 1921, like all of its predecessors, imposed the income tax upon the net income of *every individual.* The details of the Act are given in paragraph 17 next following.

17. November 23, 1921, enactment of Revenue Act of 1921, 42 St. L. 227. Title II, Part II, Sec. 210, at page 233, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $2500, unless the aggregate net income of such husband and wife is in excess of $5000, in which case the amount of such personal exemption shall be $2000. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them." Sec. 218 (a) relating to partnerships is identical with Sec. 218 (a) of the 1918 Revenue Act.

Sec. 223 (b) enacts that "If a husband and wife living together have an aggregate net income for the taxable year of $2000 or over, or an aggregate gross income for such year of $5000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

18. December 17, 1923, the House Bill which later, as

amended, became the Revenue Act of 1924 was introduced in the House, containing the following provision:

> "Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property and shall be taxed as the income of such spouse."

This proposed provision with reference to community incomes got no farther than the Committee on Ways and Means of the House, which Committee later reported the Bill *with the foregoing clause eliminated* and with *no reference to community incomes* in the Bill. See Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 375, 478, 482. The result was that the Revenue Act of 1924, like all of its predecessors, imposed the income tax upon the *net income of every individual.* The details of the Act are given in paragraph 20 following.

19. March 8, 1924 (34 Ops. Attys. Gen. 376) and October 9, 1924 (34 Ops. Attys. Gen. 395), Attorneys General render opinions regarding imposition of Federal Estate Tax upon community property of decedents resident in California. These opinions note the conflicting character of the California decisions and indicate that the wife's proprietary interest in California is not of the definite and positive character recognized by the statutes and decisions of Washington and other community property states. In the second of these opinions attention is called to the fact that Congress in two re-enactments of the Revenue Law had refused to insert provisions intended to change the existing practice of divided returns by husbands and wives as to community incomes. The opinion is confined, however, to the United States Estate Tax and expressly states that no intimation is made with respect to the income tax on community incomes.

20. June 2, 1924, enactment of Revenue Act of 1924,

43 St. L. 253. Title II, Part II, Sec. 210 (a) at page 264, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $2500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them." Sec. 218 (a) relating to partnerships is identical with Sec. 218 (a) of the 1918 and 1921 Revenue Acts. Sec. 223 (b) enacts that "If a husband and wife living together have an aggregate net income for the taxable year of $2500 or over, or an aggregate gross income of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

21. January 4, 1926, decision in *United States v. Robbins,* 269 U. S. 315, holding that in California the wife has no vested interest in community property and that the entire community income should be taxed to husband.

22. February 26, 1926, enactment of Revenue Act of 1926, 44 St. L. 9. Title II, Part II, Sec. 210 (a) at page 21, levies a normal tax "upon the net income of *every individual.*" Sec. 211 (a) levies a surtax "upon the net income of *every individual.*" Sec. 216 (c) enacts that "a husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $3500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them." Sec. 218 (a) relating to partnerships is identical with Sec. 218 (a) of the 1918, 1921 and 1924 Revenue Acts. Sec. 223 (b) enacts that "If a husband and wife living together have an aggregate net

income for the taxable year of $3500 or over, or an aggregate gross income for such year of $5000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

23. July 16, 1927, Solicitor General and Acting Attory General Mitchell renders opinion to the Secretary of the Treasury, 35 Ops. Atty. Gen. 265, regarding propriety of continuing the existing practice for separate returns of community income by husbands and wives in community property states other than California. Referring to the *Robbins* case, this opinion says:

> "Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins,* 269 U. S. 315, decided January 4, 1926, *in which it was held* that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918."

This opinion dwells on the fact that "the nature and extent of a wife's interest in community income in any of the states is to be determined from the statutes and decisions of the state," and that it is necessary for the Federal Courts to accept the decisions of the State Courts and to determine from the statutes and decisions of the state the intrinsic nature of the wife's interest. The opinion reaches the conclusion that since "there are very substantial differences between the so-called community property systems in these various states," it is recommended that test cases be initiated in each of the community property states and that the doubts involved in the questions propounded be set at rest by court decisions in such test suits.

This opinion also refers to the administrative action in the existing practice of divided returns, and the undesirability of overturning by administrative action "the method of dealing with community income which has prevailed in certain states."

24. May 29, 1928, enactment of Revenue Act of 1928, 45 St. L. 795. Title I, Subtitle B, Part I, Sec. 11, levies a normal tax "upon the net income of *every individual.*" Sec. 25 (c) relating to exemptions of husband and wife is the same as Sec. 216 (c) of the 1926 Act. Sec. 51 (b) relating to individual or joint returns of husband and wife is the same as Sec. 216 (c) of the 1926 Act. Sec. 181 and Sec. 182 (a) enact that "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity," and that "there shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. These provisions are substantially the same as corresponding provisions in Sec. 218 (a) of the 1918, 1921, 1924 and 1926 Revenue Acts.

25. December 16, 1929, enactment of Joint Resolution of Congress reducing rates of Income Tax for the calendar year 1929. Again the legislative expression is the "normal tax *on individuals.*" All the provisions of the Revenue Act of 1928 are left in force subject to the stated reduction in rates.

26. 1920-1930. For this long period the practice of separate returns by husbands and wives, each reporting one-half of community income, has been followed uninterruptedly by community property taxpayers in the states of Washington, Louisiana, Texas, Arizona, Idaho, Nevada and New Mexico. This practice began with the opinion of the Attorney General and Departmental Regulations in 1920, and has been ever since constantly recognized by all subsequent Departmental regulations, forms and proceedings, so far as concerns the states named. Dur-

ing these ten years, the husbands and wives in the states named have made their tax payments on this basis. This practice has received recognition and approval from Congress in the repeated reenactments of the Revenue Acts in the original language, so construed by the Executive Departments, and in the repeated refusals of Congress to change the language of the statutes taxing the income of "*every individual,*" so as to enact provisions having the proposed statutory meaning and intent now advocated by Apppellant. This practice has never been extended to California taxpayers. The *distinction,* in the practical application of the Revenue Acts, between the case of taxpayers in California and those in the other community property states is expressly recognized in the *Robbins* case, 269 U. S. 315, 326, 327, where the action of the Treasury Department *in making this distinction* is mentioned.